SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. —

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, PETITIONER

vs.

FRED CLIFFORD MARTIN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

Order allowing certiorari, filed March 15, 1948.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

1 In the District Court of the United States for the District of Kansas, First Division

Civil No. 1057 H. C.

FRED CLIFFORD MARTIN, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT

Affidavit in forma pauperis and order granting leave to proceed in forma pauperis

1-a AFFIDAVIT IN FORMA PAUPERIS

STATE OF KANSAS,
County of Leavenworth, ss:

Petitioner, being duly sworn on his oath as by law required, deposes and says: That he is a citizen of the United States of America; sound of mind and of legal age. That he is now in the custody of the United States Government, being confined in the United States Penitentiary, Leavenworth, Kansas. That he is now petitioning the United States District Court, District of Kansas, First Division, for a Writ of Habeas Corpus Ad-Subjiciendum. That he is a poor man, without goods, chattels, or cash assets with which to pay the cost (fee) for the filing of such petition. That this affidavit in Forma Pauperis is hereby made for the purpose of availing the petitioner of the rights and privileges, as made and provided for in Section N: 832 of Title No. 28, United States Code.

(S) FRED CLIFFORD MARTIN,
Petitioner.

Sworn and subscribed before me this 5th day of August 1947.

[NOTARIAL SEAL] (S) EDWARD O. DOUGHTY,
Notary Public.

My commission expires May 21, 1949.
Filed in the District Court August 7, 1947.

2 ORDER

It is ordered that the petitioner in above entitled action be and he is hereby permitted to prosecute said action without prepayment of fees or costs.

(S) WALTER A. HUXMAN,
Judge Assigned.

Dated August 20, 1947.

3 In United States District Court

Petition for "writ of habeas corpus ad-subjiciendum" in forma pauperis

Filed Aug. 20, 1947

To The Honorable: The Presiding Justice, and/or the Associate Justices of the Court aforesaid, Greetings:

Comes now the petitioner, Fred Clifford Martin, petitioner in the District Court of the United States of America, for the District of Kansas, First Division, for "Writ of Habeas Corpus Ad-Subjiciendum" and respectfully represents that—

1. He is a citizen of the United States of America; and is fully entitled to the protection of the laws thereof.

2. That, he is now an inmate of the United States Penitentiary, County of Leavenworth, State of Kansas.

3. That, since the 20th day of the month of May in the year of our Lord, One thousand nine hundred forty-seven (A. D. 1947), he has been illegally restrained of his personal liberty and freedom; and that he has been and continues to be, illegally confined, incarcerated, and imprisoned in the United States Penitentiary, County of Leavenworth, State of Kansas, by the defendant aforesaid, namely to wit: Walter A. Hunter.

4. That, he is there being restrained of his personal liberty and freedom, and is there illegally confined, incarcerated, and imprisoned, by virtue of a "Fraudulent Order of Commitment," that the defendant, to wit: Walter A. Hunter, uses such "Fraudulent Order of Commitment" as due authorization for the illegal confinement, incarceration, and imprisonment of the petitioner.

5. That, the petitioner was duly tried, convicted, and sentenced in the District Court of the United States of America, for the Western District of Missouri, Western Division; that such trial, conviction, and sentence was for a Violation of Section
4 No. 73, Title 18, U. S. C. Case No. 16653. That, such trial and sentence occurred on the date of April 10, 1947.

6. That, he was sentenced to a term of penal servitude, the maximum penalty of which consists of a period of ten (10) years incarceration.

7. That, the ten (10) year term of penal servitude as duly imposed upon the body and person of the petitioner, for a Violation of a statute law of the United States of America, and as aforesaid, was imposed by the Honorable J. C. Collet, Justice, United States District Court, for the Western District of Missouri, Western Division.

8. That, the aforesaid, Honorable J. C. Collet, did order, and decree that such term of penal servitude was to be duly executed

upon the body and person of the petitioner on the following day, month, and year, namely to wit. The 26th day of the month of August, in the year of our Lord, One thousand nine hunded and forty-eight (August 26, Anno Domine, 1948).

8. That, the defendant to wit: Walter A. Hunter, has of his own will and volition, failed to obey the mandate of a Justice of the District Court of the United States of America, for the Western District of Missouri, Western Division, to the evil example of all others in like case offending, contrary to law in such case made and provided and against the Peace of the Government of the United States of America, the Government and dignity of the same.

Wherefore, and because of the facts and reasons as herein set forth; the petitioner, acting by virtue of the rights vested him by the Constitution of the United States of America, does by these presents, petition the Presiding Justice and/or the Associate Justices of the United States District Court aforesaid, to immediately cause to be issued a "Writ of Habeas Corpus Ad-Subjiciendum," directed to the defendant aforesaid; commanding him to bring forth the body and person of the petitioner together with all official Court records as appertaining thereto, and at a place and time set by the Court aforesaid, to show just and legal cause, if any, for the further restraint, confinement, incarceration, and imprisonment of the petitioner; that the Court aforesaid will restore the personal liberty and freedom of the petitioner as by law and justice required.

With due honor and esteem to the plea set forth herein, petitioner will ever pray, etc.

(S) FRED CLIFFORD MARTIN,
Petitioner.

STATE OF KANSAS,
County of Leavenworth, ss:

Petitioner being duly sworn on his oath as by law required, deposes and says: He is the petitioner in the hereunto attached petition for "Writ of Habeas Corpus Ad-Subjiciendum"; that he has personally caused such petition to be constructed, and that he has carefully examined the contents therein, and that to the best of his personal knowledge and belief, that such are true and correct.

(S) FRED CLIFFORD MARTIN,
Petitioner-Affiant.

Subscribed and sworn to before me this 5th day of August 1947.

[NOTARIAL SEAL] (S) EDWARD O. DOUGHTY,
Notary Public.

My commission expires May 21, 1949.

Lodged in the United States District Court August 7, 1947.
Filed in the District Court August 20, 1947.

6 IN UNITED STATES DISTRICT COURT

Motion for the appointment of counsel

Filed Aug. 20, 1947

To the Honorable: The Presiding Justice, and/or the Associate Justices of the United States District Court Aforesaid, Greetings:

Comes now, Fred Clifford Martin, plaintiff in the hereonto attached petition for Writ of Habeas Corpus Ad-Subjiciendum and respectfully represents that:

1. He is a poor man, without goods, chattels, or cash assets, with which to engage the services of legal counsel.

2. That he is desirous of having Mr. Max Frederick, Esq., Attorney at Law, Leavenworth, Kansas, represent his petition and represent his legal interests at such time when his case may be before the Court.

3. That, he respectfully requests the Court to appoint the aforesaid Mr. Max Frederick, Esq., as his legal attorney and counsel to represent him in the matter aforecited; that such be done in accordance with the Statute Law as in such case made and provided.

With due honor and esteem to his plea herein set forth, Petitioner will ever pray, etc.

(S) FRED CLIFFORD MARTIN,
Petitioner.

Lodged in the District Court August 7, 1947.
Filed in the District Court August 20, 1947.

7 *Letter re appointment*

Filed Aug. 26, 1947.

MAX L. FREDERICK
ATTORNEY AT LAW
Axa Building, Telephone 251

LEAVENWORTH, KANSAS, *August 25, 1947.*

In Re 1057 Fred Clifford Martin v. Hunter, Warden

Hon. HARRY M. WASHINGTON,
Clerk, U. S. District Court, Topeka, Kansas:

DEAR HARRY: In reply to your letter of August 20th, will state that Mr. Martins' parents contacted me and have paid me a retainer to look into his case, and so an appointment will not be necessary in this matter.

A copy of his petition for Habeas Corpus has been received with your letter, and for which I thank you.

Very truly yours,

(S) Max L. Frederick.
MAX L. FREDERICK.

Mlf/ehh.
Received August 26, 1947. Clerk U. S. Dist. Court.
Filed in the District Court, August 26, 1947.

8 In United States District Court

Respondent's Return to Petition for Writ of Habeas Corpus

Comes now Walter A. Hunter, Warden of the United States Penitentiary at Leavenworth, Kansas, through Eugene W. Davis, assistant United States Attorney for the District of Kansas, and for his answer and return to the petition for writ of habeas corpus filed herein states to the Court as follows:

I

Respondent denies each and every allegation in petitioner's application except such as may be hereinafter specifically admitted, modified, or explained.

II

Respondent admits petitioner's custody, but denies that the same is in any manner unlawful or illegal.

III

Further answering, respondent states that petitioner is detained by this respondent as Warden of the said penitentiary under and by virtue of judgment and sentence of the Court hereinafter named.

IV

Further answering, respondent states that filed herewith, attached hereto, and made a part hereof as though fully rewritten herein are the following exhibits showing authority for respondent's detention of petitioner:

Exhibit A.—Certified copy of Indictment in criminal case No. 16,653 of the District Court of the United States for the Western District of Missouri. Said exhibit establishes that petitioner was indicted in said court on March 28, 1947, and charged in four counts with violations of Section 73, Title 18, United States Code (Counts 1 and 3 of the indictment charging forgery of United

States Treasury checks, and Counts 2 and 4 charging uttering and publishing of said checks). Respondent states that said indictment sufficiently charged offenses against the laws of the United States.

9 Exhibit B.—Certified copy of the original judgment and commitment of the petitioner, Fred Clifford Martin, in said case No. 16,653. Said exhibit establishes that on April 10, 1947, petitioner appeared before the trial court without counsel. Said exhibit further establishes that the Honorable J. C. Collet, United States District Judge for the Western District of Missouri, advised petitioner of his right to counsel and asked whether he desired to have counsel appointed by the Court, and defendant thereupon stated that he waived the right to assistance of counsel and thereupon pleaded guilty to the four counts charged in the indictment set forth as Exhibit "A," and upon such plea was sentenced as follows: Ten years on Count No. 1; Ten years on Count No. 2; Ten years on Count No. 3; Ten years on Count No. 4. The order of the court provided that the sentence imposed on Count 1 should begin to run at the expiration of the sentence then being served by the petitioner in the Missouri States Penitentiary, and the sentences imposed on Counts 2, 3, and 4 to be served concurrently with the sentences imposed on Count 1 and concurrently as to each other.

Exhibit C.—Certified copy of judgment and commitment as to Fred Clifford Martin in said cause No. 16653, bearing thereon the return of service of the United States Marshal. Said exhibit establishes that the petitioner was taken into custody by the United States Marshal for the Western District of Missouri on May 13, 1947, at the time of his release from the Missouri State Penitentiary, and said petitioner was thereafter and on May 20, 1947, committed to the custody of the respondent warden of the United States Penitentiary at Leavenworth, Kansas, as provided by law.

V

Further answering, respondent states that by statute (18 U. S. C. A. 709a) a sentence of imprisonment of a person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term.

10

VI

Further answering, respondent states that the record of court commitment of the United States Penitentiary in computing petitioner's sentence, a photostat of which is hereto attached, marked "Exhibit D," establishes that petitioner's sentence begins on May 13, 1947, on which date petitioner was released from the Missouri State Penitentiary, thereby being taken into federal custody at Jefferson City, Missouri, at that time and committed, as hereinabove stated, to the Federal Penitentiary on May 20, 1947. By virtue of the premises, and as correctly computed by said record of court commitment, petitioner's full term of imprisonment does not expire until May 12, 1957.

Wherefore, having fully answered, respondent prays the Court for an order denying petitioner's application for writ of habeas corpus herein, and for a further order dismissing this cause.

(S) Eugene W. Davis,
EUGENE W. DAVIS,
Assistant United States Attorney,
Attorney for Respondent.

11

Exhibit A to return

In the District Court of the United States of America for the Western District of Missouri, Western Division

No. 16653 (Sec. 73, Title 18, U. S. C.)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

FRED CLIFFORD MARTIN, LENORA RUTH WELCH, LEE CHRESTENSEN, DEFENDANTS

INDICTMENT

The Grand jury charges:

On or about the —— day of September 1945, the exact date being to the grand jury unknown, at Kansas City, Missouri, in the Western District of Missouri, Fred Clifford Martin, Lenora Ruth Welch, and Lee Chrestensen, having in their possession a certain United States Treasury check, to wit, No. 94,948,042, dated September 1, 1945, payable to Mrs. Edna Ruth Osborn, in the amount of $50.00, did unlawfully, feloniously, and falsely, make and forge, and caused to be made and forged, upon the back of said check a certain endorsement in writing, to wit, Mrs. Edna

Ruth Osborn, with the felonious intent and for the purpose of obtaining and receiving from the United States the sum of $50.00, and with the intent to defraud the United States thereof.

Count II

The grand jury further charges:

On or about the — day of September 1945, the exact date being to the grand jury unknown, at Kansas City, Missouri, in the Western District of Missouri, Fred Clifford Martin, Lenora Ruth Welch, and Lee Chrestensen, having in their possession the identical check described in Count I hereof, on which, as they then and there well knew, there was the identical forged and false endorsement described in said count, did unlawfully and feloniously utter and publish as true, and cause to be uttered and published as true, the aforesaid check, with the intent to defraud the United States.

Count III

The grand jury further charges:

On or about the — day of September 1945, the exact date being to the grand jury unknown, at Kansas City, Missouri, in the Western District of Missouri, Fred Clifford Martin, Lenora Ruth Welch, and Lee Chrestensen, having in their possession a certain United States Treasury check, to wit, No. 94,007,094, dated September 1, 1945, payable to Martha Louise Faler, in the amount of $50.00, did unlawfully, feloniously, and falsely, make and forge, and caused to be made and forged, upon the back of said check a certain endorsement in writing, to wit, Martha Louise Faler, with the felonious intent and for the purpose of obtaining and receiving from the United States the sum of $50.00, and with the intent to defraud the United States thereof.

Count IV

The grand jury further charges:

On or about the — day of September 1945, the exact date being to the grand jury unknown, at Kansas City, Missouri, in the Western District of Missouri, Fred Clifford Martin, Lenora Ruth Welch, and Lee Chrestensen, having in their possession the identical check described in Count III hereof, on which, as they then and there well knew, there was the identical forged and false endorsement described in said count, did unlawfully and feloniously utter and publish as true, and cause to be uttered and published as true, the aforesaid check, with the intent to defraud the United States.

13 A true bill.

[SEAL] ED NAGEL, *Foreman.*

Attest: A True Copy.

A. L. ARNOLD, *Clerk.*
By (S) N. W. HINES, *Deputy.*
THOMAS A. COSTOLOW,
Assistant United States Attorney.

Filed in the United States District Court March 28, 1947.

14 *Exhibit B to return*

JUDGMENT AND COMMITMENT

Cr. Form No. 25

District Court of the United States for the Western District of Missouri, Western Division

No. 16653—Violation: Title 18, Section 73

UNITED STATES OF AMERICA

v.

FRED CLIFFORD MARTIN

On this 10th day of April 1947 came the attorney for the government and the defendant appeared in person and without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court and the defendant thereupon stated that he waived the right to the assistance of counsel.

It is adjudged that the defendant has been convicted upon his plea of guilty of the offenses of forgery of United States Treasury checks as charged in Counts No. 1 & 3; and uttering and publishing United States Treasury checks with intent to defraud the United States as charged in Counts No. 2 & 4, as charged in the indictment of four (4) counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) years on Count No. 1; Ten (10) years on Count No. 2; Ten (10) years on

15 Count No. 3; Ten (10) years on Count No. 4. The sentence imposed on Count No. 1 to begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary. The sentence imposed on Counts No. 2, 3, & 4 to be served concurrently with the sentence imposed on Count No. 1 and concurrently as to each other, without costs.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved as to form:

THOMAS A. COSTOLOW,
Assistant United States Attorney.
J. C. COLLET,
United States District Judge.

The Court recommends commitment to: No recommendation made.

A. L. ARNOLD, *Clerk.*
By N. W. HINES, *Deputy.*

(Filed in United States District Court April 10, 1947.)

16 *Exhibit C to return*

JUDGMENT AND COMMITMENT

Cr. Form No. 25a

District Court of the United States for the Western District of Missouri, Western Division

UNITED STATES OF AMERICA

v.

FRED CLIFFORD MARTIN

No. 16653—Violation: Title 18, Section 73

On this 10th day of April 1947 came the attorney for the government and the defendant appeared in person and without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court and the defendant thereupon stated that he waived the right to the assistance of counsel.

It is adjudged that the defendant has been convicted upon his plea of guilty of the offenses of forgery of United States Treasury checks as charged in Counts No. 1 & 3; and uttering and publishing United States Treasury checks with intent to defraud the United

States as charged in Counts No. 2 & 4 as charged in Indictment of four (4) counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) years on Count
17 No. 1; Ten (10) years on Count No. 2; Ten (10) years on Count No. 3; Ten (10) years on Count No. 4. The sentence imposed on Count No. 1 to begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary. The sentence imposed on Counts No. 2, 3, & 4 to be served concurrently with the sentence imposed on Count No. 1 and concurrently as to each other, without costs.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved as to form:

THOMAS A. COSTOLOW,
Assistant United States Attorney.

J. C. COLLET,
United States District Judge.

The Court recommends commitment to: No recommendation made.

A. L. ARNOLD,
Clerk.

By N. W. HINES,
Deputy.

A True Copy. Certified this 10th day of April 1947.

[SEAL] (Signed) A. L. ARNOLD,
Clerk.

By N. W. HINES,
Deputy Clerk.

(Filed May 23, 1947, A. L. Arnold, Clerk, By W. W. Caster, Deputy.)

RETURN

I have executed the within Judgment and Commitment as follows: Defendant delivered on May 13, 1947, to Sheriff of Cole Co., Mo. at Jeff. City, Mo., after custody at Mo. State Peni. on his release to Gov't. pending place to designated to serve sentence.

18 Defendant delivered on May 20, 1947 to custody of the Warden, U. S. Penitentiary at Leavenworth, Kansas, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

FRED A. CANFIL,
United States Marshal.
By J. H. Polson,
J. H. POLSON,
Deputy.

(Filed May 23, 1947. A. L. Arnold, Clerk, by W. W. Caster, Deputy.)

19 CERTIFIED COPY

D. C. Form No. 30

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, A. L. Arnold, Clerk of the United States District Court in and for the Western District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, Original Judgment, and Commitment as to Fred Clifford Martin, and certified copy of the original judgment and commitment as to Fred Clifford Martin, bearing thereon the return of service of the United States Marshal, in the case of United States vs. Fred Clifford Martin, et al., No. 16653, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Kansas City, Missouri this 29th day of August A. D. 1947.

[SEAL]

A. L. ARNOLD,
Clerk.
By (S) W. W. CASTER,
Deputy Clerk.

20 *Exhibit D to return*

Record Form No. 1 (Revised Feb. 1936). Budget Bureau No. 43-R. Approval Expires 7-31-47.

UNITED STATES DEPARTMENT OF JUSTICE

PENAL AND CORRECTIONAL INSTITUTIONS

RECORD OF COURT COMMITMENT

U. S. PENITENTIARY

LEAVENWORTH, KANSAS

FBI #1405818. 6-7-17-Mo-USA-divorced-truck driver-7th gr-Pret-Marine-PT.

Inst. Name: Fred Clifford Martin. No. 64133–L.
Alias: None. Color: White. Age: 29.
True Name Inst.: Name and number of prior commitments to Fed. Inst.: None.
Offense: Forge U. S. Treasury Checks.
District: W. Missouri—Kansas City. J. C. Collet, Judge.
Sentence: 10 Years (4–10 Years Concurrently.) Costs: None. Fine: None.
Sentenced: Apr. 10, 1947. When arrested: April 10, 1947.
Committed to Fed. Inst.: May 20, 1947.
Where arrested: Jefferson City, Mo.
Date Rel'd Mo. St. Pen. Sentence begins: May 13, 1947. Residence: Kansas City, Mo.
Eligible for Parole: Sep. 12, 1950.
Time in jail before trial since arrest.
Eligible for conditional release with good time: Jan. 28, 1954.
Rate per mo. good time: 10. Total good time possible: 1,200 days.
Expires full term: May 12, 1957.

21 Former Com. on Sentence to Other Institutions

No.	Name of Institution	Location
12560	St. Ind. Ref.	Hutchinson, Kans.
58857	St. Penitentiary	Jefferson City, Mo.

Person to be notified in case of serious illness or death

Name: Mr. Aubert Martin.
Relation to prisoner: Father.
Address: 5838 Indiana Ave., Kansas City, Mo.

ENDORSEMENT

LEAVENWORTH, KANSAS, *August 12, 1947.*

I hereby certify and attest that these are true photostatic copies of original records on file in the Record Office, United States Penitentiary, Leavenworth, Kansas, in the case of Fred Clifford Martin, Register Number 64133–L.

(S) Carl F. Zarter,
CARL F. ZARTER,
Record Clerk,
United States Penitentiary, Leavenworth, Kansas.

Filed in the District Court September 3, 1947.

22 In United States District Court

Order directing issuance of writ of habeas corpus in certain cases

Filed Sept. 5, 1947

Whereas, Petitions for Writs of Habeas Corpus in causes hereinafter set forth have been presented to the Court, and it appearing that for a full and complete determination of said actions, the presence of the petitioners may be required, it is

Ordered that Writs of Habeas Corpus issue out of and under the hand and seal of the Clerk of this Court in the following cases, to wit:

1018—Jimmie Ira Brown v. Hunter, Warden.
1024—Marshall H. Raisin v. Hunter, Warden.
1029—Edward D. Malone v. Hunter, Warden.
1033—Ivan L. Wagner v. Hunter, Warden.
1040—Robert William Hinkle v. Hunter, Warden.
1045—W. W. Tilghman v. Hunter, Warden.
1046—Arthur Russell Howell v. Hunter, Warden.
1049—Boyd Archer Schroeder v. Hunter, Warden.
1053—Arthur R. McCleary v. Hunter, Warden.
1055—Dominques v. Hunter, Warden.
1056—Howell Cobb v. Hunter, Warden.
1057—Fred Clifford Martin v. Hunter, Warden.
1059—John E. Luckenbill v. Hunter, Warden.
1060—Julian Edgar Jakes v. State of Missouri.
1063—Ralph J. Lipe v. Hunter, Warden.
1064—Cecil A. Diggs v. Hunter, Warden.
1067—William Leo Goulette v. Hunter, Warden.
1068—Ollie Brown v. Hunter, Warden.
1071—John Robert Crouch v. Hunter, Warden.

Directing the above named respondent as Warden of the United States Penitentiary at Leavenworth, Kansas, to produce the above named petitioners before this Court in the courtroom in the Federal Building in Kansas City, Kansas, on Wednesday, September 10, 1947, at the hour of 9:30 oclock a. m. or as soon thereafter as the respective causes may be reached.

(S) ARTHUR J. MELLOTT,
United States District Judge.

Dated September 5, 1947.
Writs issued September 6, 1947.
Filed in the District Court September 5, 1947.

23 In United States District Court

Writ of habeas corpus and return

HABEAS CORPUS

D. C. Form 10

UNITED STATES DISTRICT COURT

FIRST DIVISION

District of Kansas

No. 1057 H. C.

The President of the United States of America

To Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, Greeting:

You are hereby commanded, that the body of Fred Clifford Martin by you restrained of his liberty, as it is said detained by whatsoever names the said Fred Clifford Martin may be detained, together with the day and cause of his being taken and detained, you have before the Honorable Arthur J. Mellott, Judge of the United States District Court in and for the District of Kansas, at the court room of said Court, in the City of Kansas City at 9:30 o'clock a. m., on the 10th day of September 1947, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Arthur J. Mellott, United States District Judge at Topeka this 6th day of September A. D. 1947.

[SEAL] HARRY M. WASHINGTON,
Clerk.

By (S) MARY E. CHAPIN,
Deputy Clerk.

September 12, 1947.

The above-named petitioner was produced in Court by the undersigned on September 10, 1947.

(S) W. A. Hunter,
WALTER A. HUNTER,
Warden, United States Penitentiary,
Leavenworth, Kansas.

Filed in the District Court September 13, 1947.

778193—48——2

24 In United States District Court

Order discharging writ of habeas corpus

September 10, 1947

Petition for writ of habeas corpus filed on behalf of Fred Clifford Martin, came on for hearing before the Honorable Arthur J. Mellott, District Judge, at Kansas City, Kansas, on September 10, 1947. Petitioner was present in person, having been produced on a writ of habeas corpus issued by the Court and was represented by Max Frederick, a member of the bar of this court, of Leavenworth, Kansas. Respondent was present in person and represented by his counsel, Eugene W. Davis, Assistant United States Attorney.

Thereupon, the petitioner having been duly sworn on oath testified before the court in his own behalf. There are introduced on behalf of respondent certain exhibits claimed by the respondent to be authority for petitioner's detention in the United States Penitentiary at Leavenworth, Kansas. Said exhibits consist of the following:

Exhibit A.—Certified copy of an indictment in criminal case No. 16,653 of the District Court of the United States for the western District of Missouri, evidencing that the petitioner was indicted in said court on March 28, 1947 and charged in four counts with violations of Section 73, Title 18, United States Code (Counts 1 and 3 of the indictment charging forgery of United States treasury checks, and counts 2 and 4 charging uttering and publishing of such checks).

Exhibit B.—Certified copy of original judgment and commitment of the petitioner, Fred Clifford Martin, in said case No. 16,653, evidencing that on April 10, 1947, petitioner appearing before the trial court without counsel and upon being advised of his right to counsel and asked whether he desired to have counsel appointed by the court, stated that he waived the right to assistance of counsel, and thereupon entered his plea of guilty to the four counts charged in the indictment. The judgment and commitment further evidences that upon the plea of guilty by petitioner, he was sentenced as follows: Ten years on Count No. 1; Ten years on Count No. 2; Ten years on Count No. 3; Ten years on Count No. 4. The order of the court provided that the sentence imposed on Count 1 should begin to run at the expiration of a sentence then being served by the petitioner, Fred
25 Clifford Martin, in the Missouri State Penitentiary, and the sentences imposed on the remaining counts, to wit, 2, 3, and 4, to be served concurrently with the sentence imposed on Count 1 and concurrently as to each other.

Exhibit C.—Certified copy of judgment and commitment in said cause No. 16,653 as to the petitioner, Fred Clifford Martin, bearing thereon the return of service of the United States Marshal. Said exhibit evidences that the petitioner was taken into custody by the United States Marshal for the Western District of Missouri on May 13, 1947, at the time of his release from the Missouri State Penitentiary, and further evidences that thereafter and on May 20, 1947, the petitioner was committed to custody of the respondent in the United States Penitentiary at Leavenworth, Kansas.

Exhibit D.—Record of court commitment of the United States Penitentiary at Leavenworth, Kansas, computing petitioner's sentence and evidencing that petitioner's sentence began on May 13, 1947, the date on which he was released from Missouri State Penitentiary, being taken into federal custody at Jefferson City, Missouri, on his release from said prison, and further evidencing that the full term of petitioner's sentence does not expire until May 12, 1957.

On behalf of petitioner, it is urged that the full term of his state sentence has not yet expired; that he is now under parole from the sentence imposed by Missouri state authorities, having been released from the Missouri State Penitentiary on May 13, 1947; that being under parole from his state sentence, the full term thereof not having terminated, the federal sentence imposed on April 10, 1947, which recites that the same begins to run at the expiration of sentence then being served by the petitioner in the Missouri State Penitentiary, the federal custody of the petitioner is therefore illegal.

On behalf of respondent, it is conceded that petitioner was released from state custody on parole on May 13, 1947, at the Missouri State Penitentiary, Jefferson City, Missouri, and on said date and at said state prison the petitioner was delivered into federal custody and incarcerated pursuant to sentence imposed on April 10, 1947. Respondent argues that petitioner's sentence was validly imposed, but that the time begins to run from the date he was received by the United States Marshal, to wit,
26 May 13, 1947, as provided by Section 709a, Title 18, United States Code, which reads as follows:

"SEC. 709a. Time when sentence begins to run. The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: Provided, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date

on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

Petitioner contends that his federal sentence has not yet begun and cannot begin to run while he is on parole, placing his reliance on the Ninth Circuit Court of Appeals case of Johnston v. Wright (137 F. 2d 914) to support his position. Respondent urges that the better rule to follow, in this and related cases, is the later decision of the Seventh Circuit Court of Appeals in United States ex rel. Lombardo v. McDonnell (153 F. 2d 919).

Upon consideration of the pleadings and the evidence, there being no dispute in the basic facts concerning petitioner's detention, the Court finds:

Findings of fact

1. That on April 10, 1947, the petitioner was validly sentenced to ten years imprisonment in the custody of the Attorney General, which sentence has not yet expired. That said sentence was within the maximum authorized for the offenses of which the petitioner stood convicted. That by the terms of the sentence imposed on April 10, 1947, the same began to run at the expiration of a sentence then being served by petitioner in the Missouri State Penitentiary.

2. The Court further finds that on May 13, 1947, the petitioner was released from the Missouri State Penitentiary as a
27 parolee, being delivered to federal custody at the Missouri State Penitentiary pursuant to a detainer filed by federal authorities and the petitioner was received by the United States Marshal for the Western District of Missouri from Missouri state authorities in order that the petitioner might begin the federal sentence imposed in the Western District of Missouri.

3. The Court further finds that petitioner offers no evidence of objection on the part of Missouri State authorities to petitioner's restraint by federal authorities. The Court further finds on the contrary that said Missouri officials voluntarily surrendered custody of the petitioner with full knowledge that the petitioner was to be incarcerated pursuant to the sentence theretofore imposed in the United States District Court and acquiesced in the transfer of petitioner's custody to federal control.

4. The Court further finds that by operation of law petitioner's federal sentence, imposed on April 10, 1947, began on the date of his release from the Missouri State Penitentiary on May 13, 1947, and said sentence not having expired, nor the petitioner being entitled to conditional release thereunder, a discharge from present confinement must of necessity be denied.

Conclusions of law

1. A sentence imposed to begin to run at the expiration of a sentence being served in a state institution is sufficiently clear and certain to constitute a valid cumulative sentence.

2. A state, having first acquired jurisdiction over a defendant, is entitled to retain him in custody until his sentence is completed or until custody is voluntarily relinquished. This doctrine arises upon the principle of comity and it exists between federal and state courts.

28 3. When the court of one sovereign takes a person into custody on a criminal charge he remains in the jurisdiction of that sovereign until it has been exhausted to the exclusion of the courts of another sovereign, but either the federal or a state government may voluntarily surrender a prisoner to the other without the consent of the prisoner.

4. Where a prisoner is on parole from one of two sovereigns, it is for the sovereign granting the parole and not the prisoner to determine priority of jurisdiction in connection with such parole.

5. The fact that a prisoner is released from state custody under a state parole does not exempt him from being taken into custody by federal authorities where no objection is made by the paroling state. Either the federal or a state government may voluntarily surrender its prisoner to the other without the consent of the prisoner and when one of two sovereignties has done so the other may exercise its jurisdiction over the prisoner without regard to personal objections which he may raise based upon questions of comity or priority of jurisdiction.

This Court concludes that while the decision of the Ninth Circuit Court of Appeals in Johnston v. Wright (137 F. 2d 914) seemingly gives support to petitioner's contention that his federal sentence has not yet begun, and although this Court has a profound respect for the opinions of that Court, it is felt that the reasoning in United States ex rel Lombardo v. McDonnell (153 F. 2d 919), is the proper and better rule to follow.

The rule, therefore, in the Lombardo decision, supra, being adhered to and adopted by this court, it follows that the writ of habeas corpus must be discharged and petitioner returned

29 to respondent's custody.

It is so ordered.

(S) Arthur J. Mellott,
ARTHUR J. MELLOTT, *Judge.*

Entered in the District Court September 10, 1947.

30 In United States District Court

Affidavit and motion for leave to proceed on appeal in forma pauperis

Filed Sept. 18, 1947

STATE OF KANSAS,
Leavenworth County, ss:

Comes now, Fred Clifford Martin, the above petitioner and shows to the Court that he is a citizen of the United States; that he desires to appeal to the Tenth Circuit Court of Appeals from the order of this Court denying the relief prayed for herein; that he believes he has a meritorious cause of action and is entitled to the redress he seeks by such appeal; that his appeal is taken in good faith; that he is without funds and has no property with which to pay or secure the record on appeal.

Wherefore, petitioner moves this Honorable Court for an order permitting him to file such notice of appeal and to proceed on appeal without the prepayment of fees or costs, pursuant (23 U. S. C. 832-6).

(S). FRED CLIFFORD MARTIN,
Petitioner.

Subcribed and sworn to before me this 16th day of September 1947.

[NOTARIAL SEAL] (S) EDWARD O. DOUGHTY,
Notary Public.

My commission expires May 21, 1949.
Filed in the District Court September 18, 1947.

31 In United States District Court

Order permitting appeal in forma pauperis

Sept. 26, 1947

It is ordered that the petitioner in above entitled action be, and he hereby is, permitted to proceed on appeal in said action without prepayment of fees or costs. And it is

Further ordered that six copies of the transcript in the above proceeding be furnished at the expense of the United States.

Dated at Kansas City, this 26th day of September 1947.

(S) ARTHUR J. MELLOTT,
Judge.

Entered in the District Court September 26, 1947.

32 In United States District Court

Notice of appeal

Notice is hereby given that Fred Clifford Martin, the petitioner above named, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit, from the order, discharging Writ of Habeas Corpus No. 1057 entered on the 10th day of September 1947, in the above case.

(S) FRED CLIFFORD MARTIN,
Petitioner.

Lodged in the District Court September 18, 1947.
Filed in the District Court September 26, 1947.

33 In United States District Court

Transcript of proceedings

Appearances: Hon. ARTHUR J. MELLOTT, Judge; Presiding. Max L. Frederick, Appearing for Petitioner. Eugene W. Davis, Assistant Attorney, Appearing for Respondent. Harold Pittell, Official Reporter.

* * * * * *

Be it remembered, on this 10th day of September A. D. 1947, the above matter coming on for hearing before the Honorable Arthur J. Mellott, Judge of the District Court of the United States for the District of Kansas, and the parties appearing in person and/or by counsel as hereinabove set forth, the following proceedings were had:

34 THE COURT. You are Fred Clifford Martin, are you?

PETITIONER. Yes, sir.

THE COURT. Be seated. We will be on the record in case Number 1057, habeas corpus, Fred Clifford Martin, petitioner, versus Walter A. Hunter, Warden. The record may show that Max L. Frederick, a member of the Bar of this Court, who appears on behalf of the petitioner, Eugene W. Davis, Assistant United States Attorney on behalf of the respondent. Mr. Frederick, are you ready to proceed?

Mr. FREDERICK. Yes, sir; if Your Honor please.

THE COURT. Very well, you may state your case for the petitioner.

Opening statement of Mr. Frederick

Mr. FREDERICK. If the Court please, Fred Clifford Martin, the petitioner here, is appearing before this Court upon this petition for habeas corpus and briefly the facts of his case are as follows: He was convicted in Grundy County, Missouri, on September

27, 1945, and received at the penitentiary there on September 28, 1945, to serve a term of three years for larceny of an automobile. Mr. Martin entered into the service of his term and on April 10, 1947, Mr. Martin was taken from the Missouri State Penitentiary into the United States District Court for the Western District of Missouri and before the Honorable Judge Collett
35 and was tried before him upon an indictment charging him with a violation of Section 73, Title 18, United States Code Annotated. The record shows—I believe the record will show Mr. Martin, you correct me if I am incorrect on this—that you were charged with four counts, forging United States Treasury checks on Counts 1 and 3, and uttering and publishing these United States Treasury checks with intent to defraud the United States as charged in Counts 2 and 4. That at the trial upon April 10, 1947, Mr. Martin plead guilty to the counts—the four counts in the indictment and the sentence of Judge Collett, dated April 10, 1947, was substantially as follows: He was senteneed to ten years on Count No. 1; ten years upon Count No. 2; ten years upon Count No. 3; ten years upon Count No. 4. The sentence on Count No. 1 to begin to run at the expiration of the sentence now being served in the state penitentiary—Missouri State Penitentiary. The sentence imposed on Counts No. 2, 3, and 4 to be served concurrently with the sentence imposed on Count No. 1, and concurrently as to each other without costs.

Now, I believe the facts will further show, if Your Honor please, that on May 13, 1947, by order the Board of Probation and Parole of the State of Missouri, Fred Clifford Martin was ordered released, and that was on May 13, 1947, and that among the conditions of the parole, and a certificate of which was
36 handed to Mr. Martin, was the following provisions: That he shall remain in the legal custody of the Missouri State Penitentiary but shall be amenable to orders of the Board of Probation and Parole until the expiration of his maximum term, or until returned to the Missouri State Penitentiary by order of the Board of Probation and Parole, and it was stated in the certificate and—the parole certificate, that Mr. Martin had, that his maximum sentence would expire August 26, 1948.

Now, upon his release from the Missouri State Penitentiary, the United States marshal appeared at the gate and you were taken immediately to the United States Penitentiary at Leavenworth, Kansas, where he had been serving his sentence since that time. As I recall—what date did you enter the penitentiary?

The PETITIONER. I entered the penitentiary on the 20th day of May 1947.

Mr. FREDERICK. May 20, 1947. That is briefly the statement of the facts, if Your Honor please, in connection with Mr. Mar-

tin's case, and he is basing his contentions on his petition for habeas corpus upon the fact that—upon the contentions rather, that the Missouri State Penitentiary and the sentence under which he was serving from Grundy County, Missouri, that the term had not expired and will not expire until August 26, 1948, and
37 in view of the fact of the conditions and terms of the parole which clearly showed that the retention of jurisdiction by the state of Missouri until the maximum sentence was served, that the Federal authorities would have no jurisdiction whatsoever to require him to serve the term, and by reason thereof that the warden of the federal penitentiary where he is now confined has him illegally restrained of his liberty by reason of the same.

The COURT. I take it that the essence of your contention is that if the warden of the prison had waited until May 1948, to pick him up that then he would be in prison all right?

The PETITIONER. No.

Mr. FREDERICK. No; I don't think that is his contention either, if Your Honor please. He claims also, I might add—possibly it is my fault.

The COURT. Let me ask you this, if you are not contending that are you then contending that I should send him back to Judge Collett to be resentenced?

The PETITIONER. If it please the Court. I would like to make mention, if you please, in this Court at this time that the conditions in my parole order presented to me by the Missouri State Penitentiary definitely specifies that I will remain in the legal custody of the Missouri State Penitentiary until the ex-
38 piration of maximum sentence. However, on the other hand——

The COURT. Well, Missouri isn't complaining about you being in the custody of the Warden, is she; the State of Missouri?

The PETITIONER. Here is the thing, Judge Collett specified that my sentence was not to begin to run until the expiration of sentence now being served in the Missouri State Penitentiary.

The COURT. Well, that is the reason I ask you, is it your contention that the Warden should not have picked you up until in May of 1948?

The PETITIONER. My contention is that he should not have accepted me in the penitentiary until the term had fully expired in the State of Missouri, which will be August 26, 1948.

The COURT. Is it your contention that the sentence is void?

The PETITIONER. The sentence is perfectly legal.

The COURT. But you should not be apprehended under it, and commenced to serve under it, until May of 1948; is that your theory?

The PETITIONER. That I should not begin the sentence until the expiration of sentence.

The COURT. Perhaps my question should be more properly directed to your counsel, and that is what I undertook to
39 do in the beginning. I am not being facetious, I am only trying to find out what the theory of the petitioner and his counsel is in this case. I have given considerable attention to the problem posed. I have read what seems to me to be the applicable authorities and I want to know what your contention and your theory really is.

Mr. FREDERICK. Subject, of course, Your Honor, to correction by my client, my—my idea in the answer to the Court's question as to the contention that my client has, is that in view of the sentence and the parole conditions under which he has been released from the federal penitentiary, together with the sentence of Judge Collet which states that it is not to begin to run until the expiration of the sentence now being served in the Missouri State Penitentiary, that he would be illegally confined in the federal penitentiary at the present time, and that is as far as I am prepared to go. As to whether Judge Collett's sentence is void, I have not prepared at this time, or do I know the particular claims of his sentence was void as to his plea of guilty on the four counts——

The COURT. I am trying to find out what your theory is because your theory may have some bearing upon what the Court may decide the law to be. I am not saying that it will, but I would like to know what your theory is.

Mr. FREDERICK. That is the contention, if Your Honor
40 please.

The COURT. Is there any fact dispute between you in this case that you know of; either side?

Mr. DAVIS. No; I think not, Your Honor, with the possible exception, I might elaborate just a little bit in addition to what Mr. Frederick stated.

The COURT. In that connection, I am wondering, I have taken for purposes of studying this case the respondent's return, and the documents attached to it as being correct and showing the commitment and the indictment. Have you had a chance to examine it and see if they are correct?

Mr. FREDERICK. No, sir; Your Honor, I have not seen that.

The COURT. We will take a five-minute recess of the Court a. during the recess you will be good enough to check them with your client against the files and let's see if there is any dispute between the parties as to the facts.

Mr. DAVIS. Just this one additional. It is a very, very narrow statement I would like to make.

The COURT. Mr. Frederick, Mr. Davis wants to ask you if you will make the following concession.

Mr. Davis. In addition to the fact stated by you, Mr. Frederick, can we agree that the petitioner was put out on parole by the
41 Missouri state authorities on May 13, 1947, and taken in custody at that time at the prison by federal authorities?

Mr. FREDERICK. I think that may be agreed upon.

The PETITIONER. Yes, sir. If you please, Your Honor——

The COURT. No, not now, please. You be seated. The Court is going to take a five-minute recess and I want you to look over the respondent's return and see if there is any dispute as to the correctness of the Exhibit.

(Thereupon Court recessed at 4:30 p. m. for a five-minute recess.)

The COURT. The Court suggested before we took a brief recess that you might look over and see if there is any fact issue to be resolved in this case.

Mr. FREDERICK. If Your Honor please, my client has looked over the Exhibits attached to the respondent return and find them all in order and it may be agreed as far as he is concerned.

The COURT. Now, will you desire to put on any evidence?

Mr. FREDERICK. If Your Honor please, I was noting in here as to where the certificate of parole from the Missouri State Penitentiary, are they——

The COURT. Do you want that in evidence as an Exhibit, the parole from the Missouri authorities; do you want that in evidence as an Exhibit?

Mr. FREDERICK. Yes, sir; if Your Honor please.

42 The COURT. Do you have a copy? If you want to introduce that we will let it be shown to counsel for the Government. If there is no objection we will receive it as an Exhibit.

Petitioner's Exhibit, 1, having been offered and received in evidence, is in words and figures as follows:

Petitioner's Exhibit 1

(Seal)

ORDER OF PAROLE

STATE OF MISSOURI

Board of Probation and Parole

Fred C. Martin, No. 58857, now confined in the Missouri State Penitentiary who was convicted and sentenced in the county of Grundy on the 27th day of September 1945, and received at the Penitentiary on the 28th day of September 1945, for a term of

3 years, for the crime of PG: Larceny of an auto which sentence expires on the 26th day of August 1948, is hereby released on Parole, which may be revoked without notice, by the Board of Probation and Parole, by virtue of the authority conferred by law upon said Board of Probation and Parole.

It is therefore ordered that Fred C. Martin be released on the 13th day of May 1947, upon the following conditions:

That the above-mentioned recipient shall remain in the legal custody of the Missouri State Penitentiary, but shall be
43 amenable to the orders of the Board of Probation and Parole until the expiration of the maximum term, or until returned to the Missouri State Penitentiary by order of the Board of Probation and Parole.

By the Board:

(Signed) EUGENE W. CANEY,
Chairman.

(Signed) O. J. CREACH,
Member.

(Signed) J. O. DOTSON,
Member.

Filed Sept. 10, 1947.

HARRY M. WASHINGTON, *Clerk.* 10

Clerk U. S. District Court. Div. 1. No. 1057. H. C. Marked for Identification. Petitioner's 1. Plaintiff's —. Exhibit, Defendant's —.

Clerk U. S. District Court. Div. 1. No. 1057. H. C. Admitted in Evidence. Petitioner's 1. Plaintiff's —. Exhibit, Defendant's —.

44 Mr. FREDERICK. Stand up and be sworn, please.

The COURT. Is there an objection?

Mr. DAVIS. I would like to have it identified and have the privilege of asking the petitioner a question or two.

The COURT. You may come forward and be sworn, Mr. Martin.

FRED CLIFFORD MARTIN, being duly sworn, testified in his own behalf as follows:

Direct examination by Mr. FREDERICK:

Q. What is your name, please?

A. Fred Clifford Martin.

Q. What is it?

A. Fred Clifford Martin.

Q. Fred Clifford Martin. And where are you presently confined?

A. United States Penitentiary at Leavenworth, Kansas.

Q. And upon what date did you enter that institution?

A. May 20, 1947.

Q. Mr. Martin, where were you confined, if anywhere, previous to that time?

A. Missouri State Penitentiary at Jefferson City, Missouri.

Q. And at what date if you recall, did you enter that institution?

A. I rather believe it was September 28, 1945.

45 Q. And to serve what term there in that penitentiary?

A. A term of three years.

Q. And where was that term imposed upon you and by what Court?

A. Grundy County, Trenton, Missouri.

Q. Grundy County, Missouri?

A. Yes, sir.

Q. And upon what date was the sentence given you?

A. September 27th, I believe, 1945.

Q. Now, Mr.—by the way, what was the charge in that case?

A. Motor vehicle theft.

Q. Did you have a trial before a jury?

A. No, sir.

Q. Sir?

A. I had no trial before a jury.

Q. What procedure did you take in that case before the Court?

A. Entered a plea of guilty.

Q. Entered a plea of guilty. Now, after you were confined there and before the expiration of your sentence, did you ever appear before any other Court upon any other charge; criminal charge?

A. Yes, sir.

Q. And in what Court was that?

A. Appeared before the Federal Court at St. Joseph, Missouri, before Judge Duncan, September 16, 1947.

Q. September 16, 1945, before Judge Dun an?

46 A. Yes, sir.

The COURT. Before whom?

Mr. FREDERICK. Judge Duncan at St. Joseph, Missouri.

The COURT. I thought it was Judge Collet.

A. If I didn't misunderstand you, now, you asked me if I had been brought before, for another charge, did you not?

By Mr. FREDERICK:

Q. During the term you were serving in the state penitentiary.

A. Yes, sir.

Q. What action was taken before Judge Duncan?

A. It was an indictment for the Dyer Act for the same automobile which the state had already given me three years.

The COURT. I don't get the name of the Judge.

A. Judge Duncan.

The COURT. Oh, Judge Duncan.

By Mr. FREDERICK:

Q. And it was the indictment for what?

A. Dyer Act; the same automobile on which I was given a three-year sentence for by the state.

Q. What action was taken, if any, by Judge Duncan in St. Joseph in September of '46?

A. September 16, 1946.

Q. September 16, 1946. What action was taken, if any, then?

A. I was sentenced to serve three months to run concurrently with my state time.

Q. Given three months to serve concurrently with your
47 state sentence you were then serving?

A. Yes, sir.

Q. I see. Now, Mr. Martin——

The COURT. We are a little outside as to what I understood the facts to be. I don't have any recollection about anything about the Duncan sentence.

Mr. FREDERICK. This is a surprise to me about Judge Duncan.

By Mr. FREDERICK:

Q. At any time were you taken outside the Missouri state penitentiary while you were serving this three-year sentence for any arraignment or any criminal—upon any criminal charge of any kind?

A. April 10, 1947, I was taken from the Missouri state penitentiary to Kansas City.

Q. To Kansas City, Missouri?

A. Kansas City, Missouri.

Q. And to whose Court did you go to?

A. Judge Collet.

Q. And what Court is he one of the Judges?

A. The Western District of Missouri.

Q. United States District Court?

A. District Court.

Q. I see. Now, Mr. Martin, how did it happen—tell briefly now, not in too much detail, how did it happen you were taken to the Court of Judge Collet?

48 A. I was indicted on the charges of forgery, uttering and publishing United States Treasury checks.

Q. And how many counts, if you recall, were in this indictment?

A. Four counts, sir.

Q. Four counts. I will ask you did you request to be taken before Judge Collet to dispose of this matter?

A. No, sir.

Q. State exactly how you were taken there; how were you notified or how did you happen to go?

A. I was notified just a few day previous to the time I was taken back that I would be taken back on an indictment for forgery and uttering and publishing a United States Treasury check.

Q. Who notified you to that effect?

A. The authorities in the Missouri State Penitentiary.

Q. Did you have to sign any papers or did you sign any papers in connection with going to the Federal Court of Judge Collet, of any kind or nature?

A. I do not recollect of signing any.

Q. Did you voice any objection at that time in going—in presenting yourself before Judge Collet in the United States District Court for the Western District of Missouri?

A. No, sir.

Q. You stated this was on April 10, 1947?

A. Yes, sir.

49 Q. Who appeared there before the Court that day?

A. You mean the Judge?

Q. Yes; besides the Court, Judge Collet, who was there?

A. Assistant District Attorney, Mr. Costolow, and two other people that were indicted with me on the same indictment.

Q. I see. Did the Court read the indictment to you?

A. Yes, sir.

Q. And in response to that, did the Court inquire from you as to whether you desired counsel or not?

A. They did, sir.

Q. And what reply did you give that question?

A. I refused to accept counsel.

Q. You refused to accept counsel and upon inquiry as to whether you desired to plead guilty or not guilty as to the charges contained in the indictment, what was your response?

A. Guilty.

Q. You entered a plea of guilty?

A. Entered a plea of guilty.

Q. Was anything further said between the Court at the time of this trial and your plea of guilty other than what I have asked you?

A. No, sir.

Q. After your plea of guilty what sentence did Judge Collet impose upon you?

A. Ten years on each of the counts separately, and

50 Counts 2, 3, and 4 to run concurrently with each other and concurrently to Count No. 1. Count No. 1 was not to begin

to run until the expiration of sentence now being served in the Missouri State Penitentiary.

Q. I see. Now, at the conclusion of this then what happened?

A. I was immediately returned to the Missouri State Penitentiary to finish my sentence.

Q. Finish your sentence. Now, will you state as to when, if you were, paroled from the Missouri State Penitentiary?

A. I was paroled before—called before the Secretary of the Parole Board just one week before May 13, 1947 and given notice that I would be released on May 13, 1947 on parole.

Q. Now, Mr. Martin, did you have any hearing of any kind before the Board of Probation and Parole?

A. Yes; I had a hearing before the Board of Probation and Parole, the 29th day of January 1947.

Q. At that time, was there a discussion had between you and the Parole Board as to your sentence and all surrounding facts about you; where you came from and so on?

A. It was brought to my attention that I was under consideration for parole, but due to the fact that this indictment and detainer was placed against me, the parole board placed me on a 9–12 hearing.

The COURT. What kind of a hearing?

A. 9–12.

51 The COURT. Oh, I see, I didn't understand what he said.

By Mr. FREDERICK:

Q. What further did they say about this detainer now?

A. They wanted to wait and find out definitely as to how this indictment would be handled—a detainer was placed against me in that institution.

Q. Did they indicate to you in any manner it was speeding up your parole or delaying it, the fact that the detainer had been filed according to the sentence of Judge Collet?

A. I had taken—I was under the understanding that due to the fact that this detainer was placed against me it hindered me from making parole immediately after I had my hearing before the Parole Board.

Q. In other words, your 9–12 time—by the way, when would that have been up?

A. December 26, 1947.

Q. December 26, 1947?

A. Yes, sir.

Q. And you were actually paroled, I believe, on May 13, 1947?

A. Yes, sir.

Q. Now, will you state then—you have stated that the parole was issued. Did you receive a certificate from the Board of Probation and Parole there in Missouri?

A. I did, sir.

52 Q. When you were released?

A. I did, sir.

Q. I will hand you Petitioner's Exhibit 1, and ask you to look at it and ask you then, if you know what that is?

A. This is the Order of Parole from the Missouri State Penitentiary which I received May 13, 1947.

Mr. DAVIS. No objection.

The COURT. It will be received as Petitioner's Exhibit No. 1.

By Mr. FREDERICK:

Q. Now, when you were released on May 13, 1947, will you state the procedure, that is, after you were dressed out, what happened to you then?

A. I was taken to the office of the Deputy Warden of the Missouri State Penitentiary and I was placed under arrest by the United States marshal in the office of the Deputy Warden of the Missouri State Penitentiary at that time and he placed belt and cuffs on me and took me to the Cole County Jail, Jefferson City, Missouri, and held me six days awaiting transportation to the Federal Penitentiary at Leavenworth, Kansas.

Q. And which you eventually arrived on what date?

A. 20th day of May 1947.

Q. At the Deputy Warden's office there, what was read to you?

A. Nothing at all.

Q. You stated you were placed under arrest, I believe.

53 What do you mean by "placing you under arrest"?

A. Well, the Secretary of the Board of Parole—of Probation and Parole notified me at the same time I was to be released on parole that they would have to inform the United States marshal at Kansas City, Missouri, that I was being released upon parole.

Q. Was it a representative of his office that met you in the Deputy Warden's office there?

A. The United States marshal met me there.

Q. Well, now, were you met at the gates of this penitentiary or were you met in the Warden's office and taken from the Deputy Warden's office by the marshal through the gates and to the Cole County Jail?

A. Taken from the Deputy Warden's office in the Missouri State Penitentiary through the gates to the Cole County Jail in Jefferson City, Missouri.

The COURT. Anything further?

Mr. FREDERICK. I believe that is all, if Your Honor please.

Cross-examination by Mr. DAVIS:

Q. Mr. Martin, the State of Missouri turned you over to the United States marshal to—so you could be taken to the Federal Penitentiary at Leavenworth; is that correct?

A. He notified me if you please, sir, that he was also
54 sending along—when he did this—parole papers for me to send in in the event I wasn't kept in incarceration at the Federal Penitentiary at Leavenworth, Kansas.

Q. Yes; the Missouri State Penitentiary did not object to the Federal officers taking you into custody, did they?

A. Well, that I do not know. He told me I was under the understanding it was a customary thing for them to notify the Federal people, the Federal authorities, rather, that they were releasing me under parole order since I had the detained and the sentence.

Q. And the Missouri State Penitentiary officials turned you over to the Federal authorities there at the prison?

A. Yes, sir.

Q. Actually there in the record clerk's office?

A. Deputy Warden's office.

Q. Deputy Warden's office, and you were taken out of the penitentiary then with the—in company with the United States marshal who took you in custody there in the penitentiary?

A. That is right, sir.

Q. With the approval of the Missouri State Penitentiary people?

A. That I could not say. Must have been.

Q. They voiced no objection to your custody being—they voiced no objection to your being taken by the Federal authorities?

A. Not to my knowledge; no.

55 Mr. DAVIS. That is all.

Redirect examination by Mr. FREDERICK:

Q. Mr. Martin, were any members of the Board of Pardon and Paroles there that day when you were released?

A. None of the members whatsoever.

Q. I mean that signed your certificate of parole, or members of the Commission?

A. The Secretary of the Probation—Board of Probation and Paroles, Donald W. Bunker, was the only man that was present at that time.

Q. What I was trying to get——

The COURT. Did he object to your being taken by the Federal authorities?

A. Not to my knowledge; no, sir.

By Mr. FREDERICK:

Q. Was he present and knew this man was there; the United States marshal was there?

A. Yes; because he had written a letter and notified them that they were releasing me under a parole order at that time.

Q. I see.

Mr. FREDERICK. If Your Honor please, may I ask one general statement?

The COURT. You may.

Q. Is there anything other than what I have asked you,
56 Mr. Martin, that you would like to inform this Court? Of course it is subject to the Court's approval and agreement to receive the same.

A. Well, I would like to make this statement, anyway: That to my knowledge I can't recall any objections made by the State of Missouri only this: That the remark was made directly to me by the Secretary of the Board of Probation and Parole that it was compulsory for him to notify the United States marshal in Kansas City, Missouri, that they were releasing me at that time under parole.

Q. Stated it was compulsory?

A. Yes, sir.

Q. Is that all you have to offer at this time, Mr. Martin? Will you step down?

Mr. DAVIS. No further questions.

Mr. FREDERICK. That is the petitioner's case, if Your Honor please.

The COURT. Do you care to argue the matter?

Argument of Mr. Frederick

Mr. FREDERICK. Briefly, if Your Honor please, I would like to call the Court's attention to a case which I feel under the facts stated in this case would entitle him to his release and discharge. I am quoting to Your Honor the case of Johnston versus Wright, in 137 Fed. (2d), page 914. In this particular case, the petitioner
57 was under a State Court sentence to an Illinois Penitentiary from one year to life. While serving under this sentence in the Southern Illinois penitentiary he was called for trial in the United States District Court of Danville, Illinois. He was produced from the Illinois Penitentiary for trial in the United States District Court and as a result of these cases he was convicted, one by trial, and, as I understand in the second case, he plead guilty and a fine was imposed.

Sentence of the Federal Court stated that "the sentences herein imposed shall begin upon the expiration of the sentences which the said defendants are now serving in the Southern Illinois Penitentiary."

Now, the petitioner brought his writ of habeas corpus after—as he was returned to the state penitentiary where he remains as prisoner until released therefrom on the 31st day of October 1939, and under the following facts and then the Court went into the fact that he had written—well, he had written to the Acting Director of the Bureau of Prisons—anyway, he wrote to the Justice Department and complaining of the fact that he was being held up on his parole by the fact that the Federal Government under these sentences had a so-called detainer against him and which was preventing him from being released on parole, and it seems there was an exchange of letters and finally he was released and he was taken on the date of Wright's release from the
58 penitentiary Wright was taken to the gate of the penitentiary, quoting, "where the United States marshal took him into custody and conducted him to the federal penitentiary at Leavenworth, from which institution he was regularly removed to the penitentiary at Alcatraz."

Now, Judge Denman—this case is in the Ninth Circuit—

The COURT. I have read it very carefully several times.

Mr. FREDERICK. If Your Honor please, as long as the Court—which I assume it was to begin with is familiar with this case, it is the contention of the petitioner that according to the facts of this case, which are in accord with the fact in the instant case, that the petitioner has at bar, that he would be entitled to his release in view of the fact that the decision in this case is four square insofar as the terms of the sentence is concerned, that it begin at the expiration of the sentence that he is now serving and for such reason that he would be entitled to his release. It says here, if I may quote, "The Illinois parole law gives no authority to the Department of Public Safety, Division of Correction, which governmental agency issued the parole, to terminate a Court sentence." Incidentally, it does not appear to give authority to any parole officer or board to parole a prisoner to officers of another jurisdiction for the purpose of subjecting the prisoner to a sentence obtained in the other jurisdiction.

59 "We do not present upon the broader question of the right of federal authorities to exercise the right of custody of a person while such person is under a limited state restraint by virtue of a continuation under the state law.

"For authority bearing upon this question see our opinion in Stamphill v. Johnston, decided May 24, 1943, and our opinion denying rehearing, June 29, 1943, 136 Fed. (2d), 291.

"A serious mistake has occurred and the constitutional rights of appellee Wright have been infringed. We make no expression as to his future rights or obligations which may follow appellee's release under the order which must be affirmed."

60 And I note, if Your Honor please, it quotes with approval in this Johnston versus Wright case, Wall versus Hudspeth, 108 Fed. (2d), 886, in which it was stated, "When the court of one sovereign takes a person into its custody on a criminal charge he remains in the jurisdiction of that sovereign until it has been exhausted to the exclusion of the courts of the other sovereign. That rule rests upon principles of comity, and it exists between federal and state courts. But either the federal or a state government may voluntarily surrender its prisoner to the other without the consent of prisoner, and in such circumstances the question of jurisdiction and custody is purely one of comity between the two sovereigns in the personal right of the prisoner, which he can assert in a proceeding of this kind." And then it follows on in this decision, practically it seems to me, stating that the evidence clearly shows that Wright's discharge from the Illinois prison was not based upon any showing whatever that the state sentences had expired. "He was released from the state prison nominally on parole but actually his custody was merely transferred to the Federal authorities for further imprisonment in a federal institution. Wright's state sentence was one year to life. There is no evidence whatever that this indeterminate sentence had been fixed to the period he had served in the state prison. On the other hand, the evidence is conclusive.

61 to the contrary. The order of parole provides 'effective when the federal authorities come for him. If not taken, case to be referred back to the board.' The Illinois authorities as evidenced by the two letters written by Illinois parole authorities in August 1942, indicate the Illinois records show Wright is to be a parolee if and when released."

Now, if the Court please, in addition to that case it seems to me, if Your Honor please, also in the Zerbst, Warden versus McPike case, 97 Fed. (2d), at page 253, is also in point. In this case, briefly, if Your Honor please, is it necessary to take, is it proper to take the Court's time in reciting briefly the facts in this McPike case, or is the Court familiar——

The COURT. I think I am pretty well familiar with them.

Mr. FREDERICK. In this case I would like to quote, if Your Honor please, a section. On page 254, "Under the inviolable rules of comity which are reciprocal, the state having first arrested and imprisoned McPike could not without its consent be deprived of his custody until through with him." And then cites cases. "But the state could 'lend' the prisoner to the federal government in

order to afford him a speedy trial and to convenience the witnesses who might be necessary to be assembled for or against him. This can be done without a complete surrender of the prior jurisdiction over him which the state had acquired. This
62 we think is fairly decided in the case of Ponzi v. Fessenden, 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879, and the prisoner was serving a federal sentence and was taken on habeas corpus to the state court to be tried for a state offense, the federal officer accompanying him, and maintaining federal custody. Ponzi was evidently to be returned to his federal service after trial. It was held that the procedure was lawful. The fact that Ponzi was originally in federal rather than state custody does not alter the principle, nor does the fact that he had already been convicted when 'loaned' to the state distinguish that case from this. The prior right acquired by first arrest continues unchanged until the arresting government has completed the exercise of its powers, and a waiver extends no further than it is intended to extend. Without the consent of the state authorities the United States marshal could not lawfully take the person of McPike from the state officials, although McPike had been brought into the federal court and tried, and he did not attempt to." And then it goes on about the date his sentences would begin to run.

One more case, if Your Honor please, I would like to briefly cite to Your Honor; that is Grant versus Guernsey case, in 64 Fed. (2d) at page 163 in which case briefly, and I am sure
63 Your Honor is familiar with the facts in this case also, that the petitioner was under parole from the Federal District Court, United States District Court, for the District of Kansas and was subsequently, and while on parole—while on parole a Justice of the Peace issued a complaint and he was held for trial upon a state charge charging him with embezzlement, and the Court, in commenting upon this state of facts says, "There can be no doubt Guernsey was under the jurisdiction of the federal court subject to its orders under the probation statute at any time; and when the Justice of the Peace issued his warrant for the arrest of Guernsey and then held him for trial on the state charge and that he abide the judgment of the state court, there was a direct inference with federal jurisdiction and a violation of the rule of comity by the federal and state courts.

"In Taylor v. Taintor, 16 Wall. 366, 370, 21 L. Ed. 287, it is said: 'Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to

person or thing, it is—unless there is some provision to the contrary—exclusive—effect until it has wrought its function.

64 And then this case goes on and cites the Ponzi case, which seems to be more or less a leading case in matters of this kind. "'The chief rule which preserves over two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose.' But it was there held that a statute gave to the Attorney General such control of the convict after he was imprisoned under the sentence as to authorize him to consent to the convict's trial in a state court. No statute is called to our notice, and we know of none, that gives to any officer the right here claimed by counsel representing the state."

The COURT. Missouri isn't contending here that Warden Hunter doesn't properly have custody of this man. That is your Grant versus Guernsey case.

Mr. FREDERICK. That is true.

The COURT. I don't think I care to hear you further on that phase of it.

Mr. FREDERICK. Your Honor, the main end of this case of course, is a question as to whether under the Johnston versus Wright, which is the principal case that I have cited to

65 Your Honor, as to whether this man here under the sentence that he was serving and under the terms of the parole in which he was serving, which it seems to me, if Your Honor please, is four square and exactly in point with the Johnston versus Wright case, as to whether they, the authorities, as it was stated in here, that the intention and the waiver of the writ, however, it could go and it is a question in this case, for instance,

66 as to what could the Parole Division—how far could they go in cutting short a court sentence? This man is still under the order of the Missouri State Penitentiary and under the strict terms which he had to accept before his release, be amenable to the terms of the parole—the terms of the parole under which he was released. And what does it say, "that he shall remain in the legal custody," those are the actual words, "of the Missouri State Penitentiary and shall be amenable to all orders of the Board of Probation and Parole."

We will presumably now, if Your Honor please—supposing they make an order today, how could they enforce it, what would happen; how could they carry it out and how could he carry it out; and it states on there, and this was to continue until the time—expiration of his maximum sentence, which is stated in the parole, August 26, 1948.

Now, this Johnston versus Zerbst case, if Your Honor please, seems to go upon that theory about how far a parole board could go in giving a man his freedom. Can they state to him, "We are turning you over simply for the purpose of serving the federal sentence here, and release you with certain restrictions on it, about legal custody"; but what is the kind of parole they give him, they give him one to remain in the legal custody of the Missouri State Penitentiary. Then, coexistent with that, we have here the same as in the Johnston case, Judge Collet's
67 sentence starts at the expiration of the sentence now being served in the Missouri State Penitentiary. When does this man here, the petitioner, at the bar, when does his sentence conclude there at the Missouri State Penitentiary? Can we say they can cut his sentence short?

The COURT. You say he is still serving in the penitentiary at Missouri?

Mr. FREDERICK. Most certainly, if Your Honor please, but he is serving his sentence outside the walls it seems to me, but he most certainly—under the terms of the judgment of Judge Collet that the sentence—at the expiration of the sentence, the Missouri—the parole certificate itself states "when his sentence expires," and during that time he is to be within the legal custody of the Missouri State Penitentiary.

Now, it seems to me indeed, if Your Honor please, to be quite a great stretch of the imagination to say they intended to waive all rights whatsoever over this man that they forever wiped his sentence off because according to this Johnston versus Wright case, they have no right to cut his sentence short. The Circuit Court of Grundy County, Missouri, told him what his sentence was going to be and he was to serve it in the Missouri State Penitentiary under the supervision of the Department of Paroles in that institution. How can they then in turn cut the Court's
68 sentence and shorten it up from May 10, 1947, or whatever date that was, I believe it was—went in there in May—May 13, 1947, to August 26, 1948, without any more formality than signing a piece of paper.

The COURT. Well, I was trying to get you to take a position one way or the other. I want to know whether you think that Judge Collet's sentence is void for uncertainty?

Mr. FREDERICK. No, sir; Your Honor.

The COURT. Then if it is not void for uncertainty, it would not be necessary for me to return him to Judge Collet for sentence, would it?

Mr. FREDERICK. I think that is correct, if Your Honor please.

The COURT. But you think that because of the literal language used by Judge Collet that I have to put him on the street and put

him at large from now until May of 1948, at which time he is to be apprehended for the purpose of serving Judge Collet's sentence; is that you view?

Mr. FREDERICK. If Your Honor please, I will answer it in this way: That according to the decision in this case here and they said here in the beginning of this decision here, it says, "According to the face of the records the Court provided in the sentence that the sentence herein imposed shall begin upon the expiration of the sentences which the said defendants are now serving
69 in the Southern *Southern* Illinois Penitentiary." In large measure the issues of this appeal center in this quoted portion of the sentence so it seems to me, if Your Honor please, that that certainly isn't a light part of the sentence and could be considered lightly in a matter—just so many words put in there.

The COURT. You are arguing instead of answering the question which the Court asked you.

Mr. FREDERICK. I am sorry.

The COURT. I do not mean to be critical. I am only suggesting that the Court's question hasn't been answered.

Mr. FREDERICK. If Your Honor please, I am sorry. May I have——

The COURT. Not criticizing you in the slightest, Mr. Frederick; I am just wondering, is it your serious contention, as a member of the bar of this Court, that the Court should simply say to this boy that "You are now released and we will pick you up in May of 1948 and start you on serving Judge Collet's sentence," is that what you think should be the construction?

Mr. FREDERICK. Yes, sir; in carrying out Judge Collet's sentence, in carrying out the terms of what he provided in his sentence, that is the contention of the petitioner in this case, that Judge Collet provided as he wisely saw fit as to what to do, and when
70 the sentence was supposed to start and most certainly the sentence of the Judge could not be construed adversely as to what the Court said itself against the petitioner who was standing there before him and that, as I say——

The COURT. Did you read United States versus McDonnell, a much later case, by the Seventh Circuit? 153 Fed. (2d) 919.

Mr. FREDERICK. No, sir; if Your Honor please, what is the citation?

The COURT. 153 Fed. (2d) 919, the Lombardo case, McDonnell, case.

Mr. FREDERICK. You say that was the Lombardo case?

The COURT. You may recollect, Mr. Frederick, the Court has heretofore expressed its view that the Lombardo case rather than the Wright case would govern in this kind of a case. I think your point is a very nice point, and I think you have argued it pretty

thoroughly and rather completely, but this Court feels that the Wright case is not the case for it to follow. I have previously announced that in other cases.

Mr. FREDERICK. I see.

The COURT. I think that the cases clearly justify Judge Collet in imposing this sentence which he did impose.

Now, it is true that the sentence might have been—might have been better if he had said that "You are to begin the actual
71 service of the sentence which I am pronouncing upon you, upon your release from the Missouri State Penitentiary" and if the sentence so imposed by Judge Collet is not susceptible of that construction then this Court would feel that it must remand this prisoner to Missouri for resentence by Judge Collet, but that should be done, I think, only if the sentence is void for uncertainty. I do not believe that Judge Collet's sentence is void for uncertainty and you do not believe——

Mr. FREDERICK. I do not.

The COURT. Now, you have discussed rather fully and completely and certainly intelligently, the various cases dealing with the questions of comity between different sovereigns. I am sure you are familiar with the rules enumerated by the Supreme Court in the Ponzi case which you discussed, you are familiar with Hudspeth versus Wall, you are familiar with the Johnston versus Zerbst. All of those cases, it seems to the Court, point to a view different from that reached by Judge Denman in Johnston versus Wright, which is not in accordance with the prevailing weight of authority as I see it. I think the Lombardo case, or the case of—I just called it to your attention awhile ago, United States versus McDonnell, 153 Fed. (2d) 919.

Mr. FREDERICK. McDonnell case, 153 Fed. (2d) 919.

The COURT. Yes.

72 Mr. FREDERICK. You said the Lombardo case.

The COURT. Lombardo was also one of the defendants in that case. The reason I say Lombardo is it is United States ex rel Lombardo, versus McDonnell.

Mr. FREDERICK. 153 Fed. (2d), 919.

The COURT. Yes. In that case the Seventh Circuit discusses, and I think inferentially criticizes to some extent, the conclusion reached by the Ninth Circuit in the Wright case, but I think it discusses the principle which must govern this Court in this particular habeas corpus case. I asked the petitioner categorically and specifically whether there is any objection being made by the paroling authorities in his presence. I ask you specifically if you knew of any contention or objection being made by the paroling state and so we do not have a Grant versus Guernsey case where there is a row between sovereigns over who is entitled to the cus-

tody. This petitioner appears to have had perhaps, a break given to him by beginning the service of his federal sentence months earlier than perhaps Judge Collet may have thought he would begin it. Certainly there is no—nothing to indicate that this Court should do what Judge Collet clearly would not have done, which the Board of Parole of the State of Missouri would not have done, namely, to say to this man that he may be at large for a period of one year after which he is going to have to
73 start serving Judge Collet's sentence. I don't think Judge Collet intended that, and I don't think the language used is susceptible of that construction.

My view, I know you have done considerable work on this, Mr. Frederick, and your argument indicates it. My view is that this case should be resolved by this Court as a pure question of law and that I should follow the rationale of the United States ex rel Lombardo versus McDonnell rather than attempt to apply, it seems to me, the rationale of the Wright case, so I am going to ask the District Attorney to prepare appropriate journal entry for the Court's signature announcing adherence to the Lombardo rule rather than to the Wright case; Johnston versus Wright, discharging the writ of habeas corpus and remanding the prisoner.

Mr. FREDERICK. Thank you, Your Honor.

The COURT. That will be the order.

(This ended the hearing in this cause.)

* * * * * *

(Reporter's certificate to foregoing transcript omitted in printing.)

74 In United States District Court

Praecipe for record on appeal

Filed Oct. 1, 1947

Sept. 2, 1947. U. S. District Court, Topeka, Kans. (Inspected).

From FRED CLIFFORD MARTIN 64133:
To Mr. HARRY M. WASHINGTON:

DEAR SIR: Please consider, and file this letter as a Praecipe to obtain the transcript of the record and proceedings of my recent Habeas Corpus Action No. 1057.

It is requested that this praecipe be filed under the terms of Section 832 Title 28 of the United States Code, also.

The following documents are to be included in the above requested transcript, same is to be mailed to the Clerk of the United States Tenth Circuit Court of Appeals, Denver, Colo.

Certified copy of proceedings.

Copy of petition for Writ of Habeas Corpus.
Copy of Affidavit in Forma Pauperis.
Copy of order denying petition for writ of Habeas Corpus.
Copy of order allowing leave to proceed in Forma Pauperis.
Copy of all other records filed in your office pertaining to this case.
All the above described documents are to be certified.
Respectfully submitted.

(S) FRED CLIFFORD MARTIN,
Petitioner.

Received Oct. 1, 1947. Clerk, U. S. Dist. Court.
Filed in the District Court October 1, 1947.

75 In United States District Court

Order extending time to file and docket record on appeal

Nov. 3, 1947

Now, on this 3rd day of November 1947, for good cause shown, it is, by the Court
Ordered that the time within which to file and docket record on appeal in above case in the Tenth Circuit Court of Appeals be and it is hereby extended to and including November 17, 1947.

ARTHUR J. MELLOTT,
United States District Judge.

Entered in the District Court November 3, 1947.

76 (Clerk's certificate to foregoing transcript omitted in printing.)

77 In United States Circuit Court of Appeals for the Tenth Circuit

Argument and submission

Record Entry: Cause Argued and Submitted.
Thirty-second Day, November Term, Thursday, January 8th, A. D. 1948. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.
This cause came on to be heard and was argued by counsel, Frances Hickey Schalow, appearing for appellant, Eugene W. Davis, Esquire, appearing for appellee.
Thereupon this cause was submitted to the court.

78 In United States Circuit Court of Appeals

Judgment

Jan. 13, 1948

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas, Frances Hickey Schalow appearing for appellant, Eugene Davis appearing for appellee.

On consideration whereof, it is now here ordered by the court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the United States District Court for the District of Kansas, with instructions to discharge appellant from the custody of appellee on authority of Johnston vs. Wright, 9th Circuit, 137 F. 2d 914.

79 In United States Circuit Court of Appeals

[Title omitted.]

Petition for rehearing

Filed Feb. 2, 1948

Comes now Walter A. Hunter, Warden of the United States Penitentiary at Leavenworth, Kansas, appellee herein, and respectfully petitions the court to withdraw the order entered January 13, 1948, remanding this cause (without opinion) with instructions to discharge appellant from appellee's custody on authority of Johnston v. Wright, Ninth Circuit, 137 F. 2d 914, and to grant a rehearing for the following reasons:

I

The Court inadvertently misconstrued the reasoning in Johnston v. Wright, supra, a decision which appellee believes is distinguishable and not controlling in the case at bar and is contrary to the weight of authority.

II

The Court erroneously interpreted the sentence imposed in appellant's criminal case as one which could not begin to run until the full term of a state sentence, including a parole period, had completely expired.

80 III

The Court erred in directing that appellant be discharged from appellee's custody.

Eugene W. Davis,
EUGENE W. DAVIS,
Assistant United States Attorney,
District of Kansas, Topeka, Kansas,
Attorney for Appellee.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

Since no opinion has been written and the only formal ruling is the announcement that the Court directs appellant's discharge from custody on authority of Johnston v. Wright, 137 F. 2d 914, appellee feels justified in briefly referring to some of the questions presented in the oral argument of this cause on January 8, 1948. As appellee endeavored to point out, the issue involves not only a question of when a sentence should begin to run but embraces to a great degree the doctrine of comity. From the oral argument, appellee is impelled to conclude that the Court regarded appellant's sentence as being one that could not commence until the maximum term of his state sentence had ended. This view, obviously, was prompted by the literal terms of the sentence, which provided that it should begin to run at the expiration of a sentence then being served by appellant in Missouri State prison.

81 Attention is respectfully directed to Section 709a, Title 18, United States Code, which provides as follows:

"SEC. 709a. Time When Sentence Begins to Run.—The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: Provided, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term." (June 29, 1932, c. 310, Sec. 1, 47 Stat. 381.)

Even though the sentence imposed by Judge Collet might not seem to be in strict accordance with the terms of the statute as to the date of its commencement, appellee does not believe it can be said to be void for indefiniteness. Even appellant concedes that the period of imprisonment imposed by Federal Judge Collet is legal, the only bone of contention being that he cannot be required

to begin servitude of that sentence until the full term of a three-year Missouri state sentence imposed previously has expired.

Judge Collet obviously intended appellant's federal sentence to begin at the time when appellant's person could be lawfully obtained by federal authorities without objection of the state, which had prior jurisdiction. Under a reasonable interpretation of the Court's language, this could only mean that the sentence became operative when Martin was released from state custody, either by service of the sentence in full or release from confinement by parole, pardon or otherwise. In this instance, there was more than an implied consent by Missouri officials to federal custody; there was an actual delivery for the express purpose of permitting appellant's federal sentence to begin. Appellee earnestly submits
82 that under such circumstances the legal effect could only be that the sentence would then become operative unless objection to federal jurisdiction should be interposed by the state.

The Ninth Circuit's ruling of Johnston v. Wright, while taking cognizance of the doctrine of comity, directed that petitioner Wright, an Illinois parolee, should be released from federal custody, as appellee understands the ruling, for the reason that the Illinois parole gave no authority to the Department of Public Safety, Division of Correction, which had issued the parole, to terminate a court sentence.

In the Wright decision, Judge Stephens, in his opinion, points out that the Court does not pass upon the broader question of the right of federal authorities to exercise the right of custody of a person while such person is under the limited state restraint by virtue of a conviction under state law. For authority bearing on that question, the Court refers to its decision in Stamphill v. Johnston, decided May 24, 1943, and the opinion denying rehearing, June 29, 1943, 136 F. 2d 291. A close reading of the Wright case indicates that this petitioner was released because of the unusual provisions of the Illinois parole law, which provides, among other things, that a paroled prisoner must serve at least six months on parole before a final discharge can be granted. (Illinois Revised Stat. (1941), c. 38, sec. 810) (Under the rules of the Illinois Parole Board).

In the case at bar, appellant Martin was released as a parolee by the State of Missouri. An examination of the Missouri statutes reveals that an entirely new parole act was passed in 1945. It appears under Secs. 8992.35 through 8992.47 in the Missouri Revised Statutes, published jointly by West Publishing Company and Vernon Law Book Publishing Company. The Act apparently contains no requirement that released prisoners shall remain on parole for a specified period of time, such as the Illinois statute

contains, which requires, as pointed out above, that the
83 parolee shall remain under supervision for a minimum specified period. Appellee suggests that this fact alone might seem to take appellant Martin's case from under the rule announced by the Ninth Circuit in the Wright case.

In appellee's brief was a discussion of United States V. Marrin, 227 Fed. 314, Cer. Den. 223 U. S. 719, U. S. ex rel Lombardo v. McDonnell, 153 F. 2d 919, cer. den. 328 U. S. 872, which latter decision of the Seventh Circuit appellee thought to be apposite and controlling in the case at bar.

Of all the decisions which appellee has been able to find, the judgments in the Lombardo and Wright cases contain language most nearly like that used in appellant Martin's sentence. For comparison, these three sentences provide as follows:

Martin: The Judgment provides that the sentence is to "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary."

Lombardo: The judgment provides that the sentence shall commence—"on the date of the expiration of the sentence under which said defendant is now confined in the Illinois State Penitentiary * * *".

Wright: The judgment provides that the sentences imposed "shall begin upon the expiration of the sentences which the said defendants are now serving in the Southern Illinois Penitentiary."

NOTE: Wright's sentence was imposed prior to the enactment in 1932 of 18 U. S. C. 709a, which apparently controls the commencement date of subsequent sentences, even though the judge may provide to the contrary. (See Rohr v. Hudspeth, Tenth Circuit, 105 Fed. 2d 747, discussion following.)

84 In Rohr v. Hudspeth, 105 F. 2d 747, this Court had occasion to discuss the statute (709a, Title 18, U. S. C.) with relation to when a sentence begins to run. The judgment in petitioner Rohr's case, however, undertook to provide that sentence began at the time of its imposition, although the prisoner was then before the court only temporarily on a writ of habeas corpus ad prosequendum. In disposing of petitioner's contention, this court used the following significant language:

"The court's direction that it should begin on October 15, 1932, did not make inoperative the provision of the statute which says it should begin when the prisoner is received in the penitentiary. *In other words, the court fixed the term; the law named the time of its commencement.* We are therefore of opinion that the effort of the trial court (inadvertently made in behalf of the prisoner) to fix the commencement of the term at a date earlier than that provided by the statute was error and in consequence invalid; yet it affected the validity of the sentence only to that ex-

tent, leaving the rest of the sentence as though the court had said nothing about the commencement of the terms. * * *" [Italics supplied.]

The Court concluded:

"Petitioner's sentence did not commence to run prior to January 16, 1936, the date he was given over to the United States Marshal by the state authorities. Thereafter he was detained awaiting transportation to the federal penitentiary. The last sentence of the statute says: 'No sentence shall prescribe any other method of computing the term.' There is no reason why Congress cannot pass such a law. In the face of the statute fixing the commencement of the term of sentence the words 'from this date' are inoperative."

To appellee the above view of this Court suggests that the words in appellant's sentence reciting shall begin to run "at the expiration of the sentence now being served in the Missouri State Penitentiary" would be likewise inoperative for the reason that while Judge Collet fixed the term, the statute (709a, Title 18) named the time of its commencement.

In the respective opinions of the Lombardo and Wright cases, reference and discussion is made of U. S. ex rel Demarois v. Farrell, 87 Fed. 2d 957 and Stamphill v. Johnston, 136 Fed. 2d 291. It may be noted in passing that certiorari was denied in the Lombardo and Demarios, as well as the Stamphill, decisions, though no petition for certiorari seems to have been presented to
85 the Supreme Court in the Wright case.[1]

In the hope that the Court may see fit to further review the above and related decisions on a subject matter that quite naturally encompasses the doctrine of comity, appellee urges the Court to grant a rehearing in this cause.

It is not counsel's desire to unduly consume the Court's time or to delay this prisoner's release from a sentence, which is not claimed to be illegal but merely the time of commencement being challenged. Were it not for the conviction that the Court unwittingly erred in an impromptu ruling without an opinion, the writer would be loath to suggest further argument. However, in order to fulfill, not only his obligation to the appellee, but to the Court as well, he desires, if the Court deems it proper, to reargue the cause and respectfully requests that privilege.

Respectfully submitted.

Eugene W. Davis,
EUGENE W. DAVIS,
Assistant United States Attorney,
District of Kansas, Topeka, Kansas,
Attorney for Appellee.

[1] Not squarely in point, but containing full discussion on the subject matter involved are: Ponzi v. Fessenden, 258 U. S. 254; Wall v. Hudspeth, 108 F. 2d 865; Kirk v. Squier, 150 F. 2d 3.

CERTIFICATE OF ATTORNEY

I, Eugene W. Davis, attorney of record for appellee, hereby certify that I prepared the foregoing petition for rehearing and the argument in support thereof, and that the contentions therein made are in good faith. I further certify that the petition
86 for rehearing is not for the purpose of delay but to invite and respectfully urge this Court to render an opinion on an important, close and perplexing question, one in which there is a diversity of view by various Federal courts, and clarification of which is needed to serve as a guide in the matter of imposing sentences in criminal cases.

Eugene W. Davis.
EUGENE W. DAVIS.

87 In United States Circuit Court of Appeals

Order denying petition for rehearing

Feb. 12, 1948

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

88 (Clerk's certificate to foregoing transcript omitted in printing.)

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FILED
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No. 643

In the Supreme Court of the United States

October Term, 1947

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, PETITIONER

v.

FRED CLIFFORD MARTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. —

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, PETITIONER

v.

FRED CLIFFORD MARTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, reversing the judgment of the District Court for the District of Kansas dismissing a writ of habeas corpus and remanding respondent to petitioner's custody.

OPINIONS BELOW

The circuit court of appeals reversed the judgment of the district court without opinion on the authority of *Johnston* v. *Wright*, 137 F. 2d 914 (C. C. A. 9). The findings of fact and conclu-

sions of law of the district court appear at pp. 18–19 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered January 13, 1948 (R. 43), and a petition for rehearing (R. 43–48) was denied February 12, 1948 (R. 48). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

While confined in the Missouri State Penitentiary, respondent was sentenced by a federal district court to imprisonment for a term of ten years. The judgment provided that the sentence should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary." Respondent was thereafter paroled from the state prison and surrendered by the state authorities to federal custody. The question is whether the judgment required that his federal sentence should not be executed by commitment under it until the term of respondent's state parole expires, or whether the judgment meant that upon release from confinement in the state prison, respondent should commence service of the federal sentence.

STATEMENT

On September 27, 1945, respondent pleaded guilty in a Missouri state court to a charge of

automobile theft, and he was sentenced to imprisonment for a term of three years (R. 27). He commenced service of the sentence in the Missouri State Penitentiary on the following day (R. 27).

On March 28, 1947, respondent was indicted in the United States District Court for the Western District of Missouri in four counts charging the forging and uttering of United States Treasury checks, in violation of Section 29 of the Criminal Code (18 U. S. C. 73) (R. 7–9). Respondent pleaded guilty to the charges of the indictment, and on April 10, 1947, he was sentenced to imprisonment for a term of ten years on each count, the sentences to run concurrently (R. 10–11). The judgment provided that the federal sentence should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary" (R. 11). Respondent was promptly returned to the state penitentiary to resume service of the state sentence, the full term of which expires August 26, 1948 (R. 30).

After imposition of the federal sentence, respondent was granted a parole by the Missouri Board of Probation and Parole (R. 30–31, 25–26). The federal authorities were notified of this action, and on May 13, 1947, he was delivered to their custody in the office of the deputy warden of the penitentiary (R. 31–32) and in the presence of the Secretary of the Missouri Board of Probation and Parole (R. 32). He has since been con-

fined under the federal sentence at the United States penitentiary at Leavenworth, Kansas.

On August 20, 1947, respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas, in which he challenged the legality of petitioner's custody of him on the ground that the federal judgment provided that his federal sentence should be served commencing upon the expiration of the full term of the state sentence, on August 26, 1948 (R. 2–3). Petitioner filed a return (R. 5–7) in which it was alleged that the judgment required that respondent start serving his federal sentence on May 13, 1947, when he was released from the state prison. The writ issued (R. 15), and after a hearing, the court ordered it discharged. Relying on the authority of *United States ex rel. Lombardo* v. *McDonnell*, 153 F. 2d 919 (C. C. A. 7), and expressly declining to follow a contrary decision of the Ninth Circuit in *Johnston* v. *Wright*, 137 F. 2d 914, the district court held that the judgment required that the federal sentence should be served immediately upon respondent's release from the Missouri penitentiary (R. 16–19). On respondent's appeal to the Circuit Court of Appeals for the Tenth Circuit, that court reversed the judgment of the district court and remanded the cause with directions to discharge respondent, on the authority of the Ninth Circuit's decision in *Johnston* v. *Wright, supra* (R. 43).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In reversing the judgment of the district court.

2. In holding that the judgment of conviction requires that respondent shall not be committed to serve the federal sentence until his state parole period expires.

REASONS FOR GRANTING THE WRIT

1. The single, narrow question presented by this case involves the proper construction of the language of the judgment providing that the federal sentence should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary" (R. 11). The question is whether this language gives respondent the right not to be required to serve his federal sentence until his parole period expires. There is no question here of a conflict between the two sovereignties, for the state has surrendered respondent to federal custody.

A similar question was first considered by the Circuit Court of Appeals for the Ninth Circuit in *Johnston* v. *Wright*, 137 F. 2d 914, where the federal judgment in question provided, "* * * the sentences herein imposed shall begin upon the expiration of the sentences which the said defendants are now serving in the Southern Illinois Penitentiary." The facts there were the same as in this case, and the court held that the prisoner

was entitled to be discharged from federal custody. It was the Ninth Circuit's view that the "starting of the sentence is premised upon the expiration of the state sentences and not upon Wright's release from the state prison." (137 F. 2d at 916.)

The question arose again in the Seventh Circuit in construing a federal judgment which provided that the sentence should commence "on the date of the expiration of the sentence under which said defendant is now confined in the Illinois State Penitentiary * * *." *United States ex rel. Lombardo* v. *McDonnell*, 153 F. 2d 919, 920. The Seventh Circuit said that it was unable to agree with all that was said in *Johnston* v. *Wright*, *supra*, and it held that the prisoner had no right not to be committed under his federal sentence until the expiration of his state parole period.

The decisions of the two courts below illustrate the conflict between the circuits. The district court agreed with the view of the Seventh Circuit and accordingly discharged the writ. The Tenth Circuit agreed with the Ninth Circuit's position and therefore reversed the order of the district court.

It is true that, literally construed, the judgment of conviction provides that the federal sentence should be served upon the expiration of the state sentence, and it is true that, technically speaking, the state sentence is not terminated until the

parole period expires.[1] But so to construe the judgment is to disregard the intent of the court. And this is no more justifiable in construing a judgment than it is to disregard the legislative intent in construing a statute. It seems plain to us that the pertinent language of the judgment of conviction was inserted for the purpose of preventing a collision between the federal and state sovereignties. The purpose of the court was to remit respondent to the state, which had first claim to his custody, and to defer execution of the federal sentence until such time as the State released him from custody.[2] That time arrived and the State surrendered him to the Federal Government.

It is unreasonable to assume that the sentencing court contemplated that respondent would enjoy an interlude at large before beginning service of his federal sentence. Certainly the interests of society are not served by permitting a prisoner with a concededly valid ten-year sentence pending to remain at large. And the interests of the defendant are not served by such a view. For it is to his advantage to serve his sentences without an interruption in confinement, so that when once

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[1] See Section 39, Department of Corrections Act, Laws of Missouri, 1945, pp. 723, 736.

[2] If the disputed language in the judgment had been omitted, respondent's federal sentence would have commenced pursuant to 18 U. S. C. 709a, when he was received in federal custody for transportation to a federal prison.

released he may effect his rehabilitation without being faced with the prospect of reincarceration.

The view of the Ninth Circuit means that in a case where a state prisoner has a long parole period, the beginning of the federal sentence may be interminably delayed or, in the case of a life-term prisoner who is placed on parole for life, it may never be served. Such a view does not contribute to the successful administration of the criminal laws or to public respect for the judicial process.

We agree with the Seventh Circuit and with the district court below that the judgment conferred no right on respondent not to be committed under his federal sentence when he was released from imprisonment by the state. His obligation is to serve a term of imprisonment for ten years, and he may not delay the time for the execution of the sentence by resting on a provision of the judgment that was intended to protect the State's interests, not to grant him what deceptively appears to him to be a bounty.

2. While the problem of this case can be averted in the future by providing in judgments that the federal sentence shall commence upon the discharge of the prisoner from confinement by the state (see *Kirk* v. *Squier*, 150 F. 2d 3 (C. C. A. 9), certiorari denied, 326 U. S. 775), there are many outstanding judgments which contain language substantially identical to that involved in the

judgment in this case, and it is anticipated that considerable habeas corpus litigation will follow. It is important in the administration of the federal penal system that the conflict of decisions be resolved by this Court, and that a uniform rule be applied in all the federal courts.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 643

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, PETITIONER

v.

FRED CLIFFORD MARTIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The circuit court of appeals, without opinion, reversed the judgment of the district court and ordered respondent discharged from petitioner's custody on the authority of *Johnston* v. *Wright*, 137 F. 2d 914 (C. C. A. 9) (R. 43). The order discharging the writ of habeas corpus, findings of fact and conclusions of law of the district court appear at R. 16–19.

JURISDICTION

The judgment of the circuit court of appeals was entered January 13, 1948 (R. 43), and a petition for rehearing (R. 43–48) was denied February 12, 1948 (R. 48). The petition for a writ of certiorari was filed on March 4, 1948, and on March 15, 1948, the petition was granted and the case transferred to the summary docket (R. 11).

QUESTION PRESENTED

While confined in the Missouri State Penitentiary, respondent was sentenced by a federal district court to imprisonment for 10 years. The judgment provided that the sentence should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary." Respondent was thereafter paroled from the state prison and surrendered by the state authorities to federal custody for the purpose of serving his federal sentence. The question is whether, even though respondent was turned over by the state authorities to the Federal Government for execution of his federal sentence, that sentence should be interpreted as meaning that it cannot begin to run until respondent's state parole period expires.

STATEMENT

On September 27, 1945, respondent pleaded guilty in a Missouri state court to a charge of automobile theft and was sentenced to imprison-

ment for three years. He commenced service of this sentence in the Missouri State Penitentiary on the following day (R. 25–26, 27).

On March 28, 1947, respondent was indicted in the United States District Court for the Western District of Missouri in four counts charging the forging and uttering of United States Treasury checks, in violation of Section 29 of the Criminal Code (18 U. S. C. 73) (R. 7–9). He pleaded guilty to these charges, and on April 10, 1947, he was sentenced to imprisonment for ten years on each count, the sentences to run concurrently (R. 9–11). The judgment provided that the sentence on count 1, and consequently on all four counts, should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary" (R. 10, 11). Respondent was promptly returned to the state penitentiary to resume service of the state sentence (R. 30).[1] The expiration date of the maximum term of that sentence is August 26, 1948 (R. 26; see R. 23).[2]

Effective May 13, 1947, respondent was granted a parole to run to August 26, 1948, unless sooner

[1] A detainer based on the federal charges was apparently lodged with the state prison (R. 30).

[2] It does not appear from the record why this date is August 26, 1948, rather than three years from September 28, 1945, when respondent commenced service of the sentence. The apparent discrepancy of approximately one month may possibly be due to his having been given credit on the sentence for time spent in custody prior to his plea and sentence. Whatever the explanation, the discrepancy is without relevance in this case.

revoked, signed by the members of the Missouri Board of Probation and Parole (R. 25–26, 31). On that date he was delivered, for the purpose of serving his federal sentence, to the custody of the United States Marshal in the office of the deputy warden of the penitentiary (R. 31–32) and in the presence of the secretary of the Missouri Board of Probation and Parole (R. 32–33). Respondent was taken to the Cole County Jail in Jefferson City, Missouri, for a few days (R. 31), but since May 20, 1947 (R. 12–13), he has been confined under the federal sentence at the United States Penitentiary at Leavenworth, Kansas.

On August 20, 1947, respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas in which he claimed that petitioner had no authority to hold him in custody under the federal sentence because that sentence directed that its execution was to commence on August 26, 1948 (R. 2–3). Petitioner filed a return (R. 5–7) in which it was contended that the federal sentence properly began to run as of May 13, 1947, when respondent was released from the state penitentiary and delivered into federal custody. The writ issued (R. 15), and, after a hearing (R. 21–41), the court ordered it discharged and remanded respondent to petitioner's custody (R. 16–19). The court preferred to rely on the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States*

ex rel. Lombardo v. *McDonnell*, 153 F. 2d 919, 920–921, rather than on the contrary Ninth Circuit decision in *Johnston* v. *Wright*, 137 F. 2d 914 (R. 19). On respondent's appeal to the Circuit Court of Appeals for the Tenth Circuit, that court, without opinion, reversed the judgment of the district court and remanded the case with directions to discharge respondent from petitioner's custody on the authority of the Ninth Circuit's decision in *Johnston* v. *Wright*, *supra* (R. 43).[1]

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In reversing the judgment of the district court.

(2) In holding that the judgment of conviction requires that respondent shall not be committed to serve the federal sentence until his state parole period expires.

SUMMARY OF ARGUMENT

A. Controlling weight should be given to the federal sentencing judge's intent if that is revealed with fair certainty. *United States* v. *Daugherty*, 269 U. S. 360, 363. In sentences of the type involved in this and the *Wright* case, relied upon by the court below, it is evident that the sentencing judge has two objectives in mind:

[1] Enforcement of the judgment and mandate of the circuit court of appeals was stayed by this Court on March 8, 1948, pending the final disposition of the case.

He does not want the sentence to run concurrently with the state sentence, and, in the spirit of comity, he is directing that his sentence is not to become operative until it becomes apparent that the state sentence no longer constitutes an obstacle to the enforcement of the federal sentence or, at least, is regarded by the state authorities as no longer being such an obstacle. When, as here, the responsible state officials have paroled the prisoner and surrendered him to the Federal Government for service of his federal sentence, the state sentence has, in a very realistic sense, come to an end or "expired" in that it is no longer an impediment to the enforcement of the federal judgment. It was at that point, we think it clear, that the sentencing judge intended the federal sentence to become operative. Any further postponement could have no practical relationship to the problem of enforcing the federal judgment.

To tie the beginning of respondent's federal sentence to the expiration of his state parole period would produce results which certainly no federal sentencing judge could seriously have contemplated. It is unreasonable to assume that he would have so disregarded the interests of society, as well as of the defendant himself, as to permit a prisoner with a concededly valid 10-year federal sentence to remain at large before commencing to serve it. The obvious temptation of flight to avoid reincarceration and the manifest

desirability of a defendant's serving his sentences without interruption, so that when finally released he may effect his rehabilitation without being faced with the prospect of reincarceration, are among the factors which make against any such assumption.

The decision of the district court that respondent's federal sentence commenced when he was surrendered by the state authorities and taken into federal custody for service of the federal sentence is supported by the decision of the Seventh Circuit in *United States ex rel. Lombardo* v. *McDonnell*, 153 F. 2d 919, 920–921, as well as the practice reflected by a number of cases involving analogous state and federal consecutive sentences of assuming custody under the later sentence prior to the technical expiration of the earlier sentence without objection by the authorities of the other sovereignty, a practice indicative of the artificiality of the Ninth and Tenth Circuits' view.

B. The Ninth Circuit's decision in *Johnston* v. *Wright* was influenced to a large extent by its analysis of the Illinois parole law and the resulting conclusion that the Illinois parole agency was without authority to parole a prisoner for the purpose of subjecting him to the service of a sentence obtained in another jurisdiction. We think that under the Missouri law the Missouri parole board had the power held to be missing in the *Wright*

case but, we submit, the question of the board's power is without relevance. The question here is, simply, whether the sentencing judge intended respondent's federal sentence to become effective when it became evident, as it did, that the state sentence was regarded by the local authorities as no longer an obstacle to the enforcement of the federal judgment. The question is not whether the Missouri parole authorities properly administered state law in surrendering respondent to the custody of the Federal Government for service of his sentence. This, clearly, is a problem purely of state concern. Obviously, also, respondent is not in a position to say that comity demands that he be allowed to remain at large in Missouri until his parole period expires and thus postpone the execution of his federal sentence. The authorities cited at pages 21–27, *infra*, including also, we think, the later Ninth Circuit decision in *Kirk* v. *Squier*, 150 F. 2d 3, clearly support these propositions.

ARGUMENT

Properly construed, respondent's federal sentence became effective when he was released from the state prison on parole and surrendered to the federal authorities to serve the federal sentence

It is clear from respondent's own testimony at the habeas corpus hearing that the Missouri Board of Probation and Parole released him on parole on May 13, 1947, for the express purpose of surrendering him to the Federal Government

for the service of his 10-year federal sentence. This sentence, under normal circumstances, would obviously run far beyond the expiration of the maximum term of his state sentence on August 26, 1948, and, hence, beyond his state parole period (R. 25–26). The state reserved control over respondent as a parolee only in the event that he was not kept in incarceration at the Leavenworth Federal Penitentiary during the state parole period.[4]

In this context, the question presented is whether respondent's state sentence had, within the meaning of the federal sentence, "expired"

[4] The order of parole signed by the members of the Missouri Board of Probation and Parole (R. 25–26), which was handed to respondent at the time of his release from the state prison (R. 31), provided (R. 26) that respondent "is hereby released on Parole, which may be revoked without notice, by the Board of Probation and Parole," and "That the above-mentioned recipient shall remain in the legal custody of the Missouri State Penitentiary, but shall be amenable to the orders of the Board of Probation and Parole until the expiration of the maximum term, or until returned to the Missouri State Penitentiary by order of the Board of Probation and Parole." However, respondent at the habeas corpus hearing testified that he was told by the secretary of the Board a week before May 13, 1947, that he would be released on parole on that date (R. 30), that the United States Marshal at Kansas City, Missouri, would be informed of the release (R. 31), and that, when he was surrendered to the custody of the United States Marshal, the secretary of the Parole Board notified him "that he was also sending along * * * parole papers for me to send in in the event I wasn't kept in incarceration at the Federal Penitentiary at Leavenworth, Kansas." (R. 32.) The secretary of the Board is its "chief administrative and executive officer" (*infra*, p. 25).

at the time he was surrendered to the Federal Government, so that the federal sentence could then become operative.

In ordering respondent's discharge from federal custody and in reversing the decision of the district court, the Circuit Court of Appeals for the Tenth Circuit relied, without discussion, on the Ninth Circut decision in *Johnston* v. *Wright*, 137 F. 2d 914. In that case Wright was serving a one-year to life sentence in an Illinois state penitentiary. While serving that sentence he was sentenced in the Illinois federal district court on two indictments, the first sentence, covering 10 years, providing that it should begin at the expiration of the sentence Wright was then serving in the Illinois state penitentiary. Wright was returned to the Illinois state penitentiary but was later released on parole by the state authorities and surrendered to the Federal Government for service of his sentence. Wright was to be returned to Illinois as a parolee if and when he was released from federal restraint.

In ordering Wright released from federal custody, the Ninth Circuit, as we read its decision, held that the federal sentence had not begun to run because under its language its commencement was conditioned not upon Wright's release from the state prison but upon the technical expiration of the state sentence, which evidently could not occur until Wright was discharged from

parole control. It also held that under Illinois law the Illinois parole agency was without power to release a prisoner from a state prison nominally on parole but actually for the purpose of transferring him to the federal authorities for further imprisonment in a federal institution.[5]

In the later Ninth Circuit case of *Kirk* v. *Squier*, 150 F. 2d 3, certiorari denied, 326 U. S. 775, the facts were that at the time the federal sentence was pronounced Kirk was serving in a California state prison a sentence for life, "with possibility of parole." Eight years later he was released from the state prison and paroled into the custody of the federal authorities for the purpose of serving his federal sentence. The Ninth Circuit, distinguishing its prior decision in the *Wright* case, reached the conclusion that the federal sentence was in effect because, unlike the sentence in the *Wright* case, it provided that it should commence to run upon the "release" of Kirk "from the imprisonment" he was serving under the California sentence, and because the court found that under state law the California parole board had power to fix as a condition of parole that the parolee serve the federal sentence, a power which it had decided in the *Wright* case the Illinois paroling agency did not have. But the court also held that the fact that Kirk

[5] See also the decision of Circuit Judge Denman, on habeas corpus, affirmed on appeal by the Circuit Court of Appeals for the Ninth Circuit (51 F. Supp. 639 (N. D. Cal.)).

still retained the technical status of a state parolee was of no consequence because neither Kirk nor the Federal Government had a legal right to interfere with California's administration of its own parole laws, because Kirk could not by habeas corpus invoke the doctrine of comity to resist the exercise of state authority, and because the federal sentence contemplated a release from actual imprisonment, and not the "ambulatory" imprisonment of a parolee.

Considering these two decisions together, it would appear to be the view of the Ninth Circuit that the fact that a defendant incarcerated under a federal sentence is technically a state parolee is without significance, provided that the state parole agency has authority to utilize the parole procedure to surrender him to the Federal Government for service of that Government's sentence, and provided further that the federal sentence uses the formula that it is to begin to run when the defendant is "released from imprisonment" under the state sentence rather than that it is to commence upon the "expiration" of the state sentence.

The twofold vice in these decisions, it seems to us, is that they attribute a difference in purpose to diversities of language in federal sentences which were, in reality, intended to accomplish the identical result, and that they indulge in an appraisal of state parole power which was with-

out relevance in the interpretation of the federal sentences involved.

In determining the meaning of a federal sentence, there is no rule of strict construction comparable to the principle applicable in the interpretation of a penal statute. It is sufficient that sentences in federal criminal cases "reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded." *United States* v. *Daugherty*, 269 U. S. 360, 363. Judged by this criterion, the question then is: Did the sentencing judge intend that his sentence should begin to run when respondent was released from imprisonment under his state sentence and that sentence was regarded by the state authorities as no longer an obstacle to the enforcement of the federal judgment, or did he intend that, notwithstanding the state's consent to the earlier service of the federal sentence, it should not commence prior to the expiration date of the maximum term of respondent's state sentence, even though the later portion of that sentence was to be served only on parole?

A. *The objectives of the sentencing judge in directing that the federal sentence should commence upon the "expiration" of the Missouri state sentence respondent was then serving.*—The Ninth Circuit construes a federal sentence of the type

involved in this and the *Wright* case as though it stated precisely that it is to begin on the date when the defendant's maximum state term expires, or, the equivalent date, when his parole period ends.[6] But the sentence does not say that. Actually, it uses the less precise language that it is to commence upon the "expiration" of the state sentence then being served. Viewing the language in the light of the objectives which the sentencing judge must undoubtedly have had in mind when he used it, it seems to us that he intended to accomplish exactly the same thing as did the federal judge in the *Kirk* case who made his sentence commence when Kirk was "released from imprisonment" under the prior state sentence. Each judge was saying that he did not want his sentence to be served concurrently with the state sentence but to constitute additional punishment.[7] At the same time, he was articulating a principle of com-

[6] This date would presumably, as here, ordinarily coincide with the expiration date of the defendant's maximum state term, but see the reference in the decision of Judge Denman in *In re Wright*, *supra* (51 F. Supp. at 643) to provisions of the Illinois parole law which give the state parole agency, with the approval of the Governor, the power to free a parolee earlier from the conditions of his parole and to terminate his sentence.

[7] Despite the provisions of 18 U. S. C., Supp. V, 753f that "All persons convicted of an offense against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences of

ity which had long obtained between the national and state governments. He was recognizing that the state sentence had priority because state custody first attached, and he was, therefore, in ef-

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all such persons shall be served," there have been various instances where federal district judges have directed that their sentences run concurrently with existing state sentences without objection by this Department. In fact, the record shows that during the course of the service of respondent's state sentence he was given a concurrent federal sentence of three months for theft of the same automobile for which he was sentenced by the state (R. 27–28). The prisoner in such cases would, of course, have no reason to complain because his federal sentence was concurrent.

Where, however, the federal sentence is silent as to whether it is to be served concurrently or consecutively with an existing state sentence, there are several decisions which hold that the federal sentence begins to run only when, after completion of the state sentence, the defendant is incarcerated under the federal sentence. *Zerbst* v. *McPike*, 97 F. 2d 253 (C. C. A. 5); *Ex parte Aubert*, 51 F. 2d 136 (N. D. Cal.); *Ex parte McCullen*, 29 F. 2d 852 (W. D. Wash.); see also *United States* v. *Marrin*, 227 Fed. 314 (E. D. Pa.). The rationale of these decisions appears to be that, contrary to the usual rule obtaining as to federal sentences where the second sentence is silent as to the date of commencement, the federal sentence should not be considered as running concurrently with the state sentence because, under the principle of comity, the state should be permitted full custody of the prisoner until his imprisonment under the state sentence is terminated. The *McPike* decision also pointed to the provisions of 18 U. S. C. 709a (see footnote 8, *infra*, pp. 17–18) that a federal sentence should not begin to run until the prisoner is incarcerated under the federal sentence. None of these cases involved any attempt, as here, to prevent the execution of the federal sentence until the expiration of a state parole period.

fect directing that the federal sentence was to become operative only when it became apparent that the state sentence no longer constituted an obstacle to the enforcement of the federal sentence, or, at least, was regarded by the state as no longer being such an obstacle.

This might occur in various ways; For example, the prisoner might serve the full term of his state sentence; he might serve a shorter period because of good time credits; he might be pardoned; his state sentence might be commuted, perhaps for the very purpose of surrendering him for service of the federal sentence; or, as in the *Kirk* and *Wright* cases, and here, the state might release the prisoner through its parole procedure and surrender him to the federal authorities for service of the federal sentence. But when any of these things occurred, whether by operation of state law or the action of responsible state officials, there was no good reason for any further postponement of the execution of the federal judgment. The impediment presented by the state sentence to the enforcement of the federal sentence had been removed. So far as execution of the federal sentence was concerned, the state sentence had, in a very realistic sense, come to an end, "whether it expired by completion of the full term or by earlier termination in any other manner." *Wall* v. *Hudspeth,* 108 F. 2d 865, 867 (C. C. A. 10): The prisoner had been "released from im-

prisonment" under the state sentence, and the state sentence had also "expired" in that it was no longer an obstacle to the enforcement of the federal judgment. The federal judge could have no reason to postpone the commencement of a criminal sentence beyond this date. Any further postponement could have no practical relationship to the enforcement of the federal judgment. In framing his sentence the federal judge was certainly not concerned with the administration of the state parole law, if he gave any thought to that matter. What he was interested in, clearly, was the avoidance of any conflict between the execution of the state and federal sentences, an objective which his language sufficiently accomplished. That objective could have been achieved no better if he had provided that respondent's sentence should begin upon his "release from imprisonment" under the state sentence, for even in that situation there would have had to be some indication, in the event of parole, that the state acquiesced in the assumption of federal custody before such custody would have been appropriate. Cf. *Rosenthal* v. *Hunter*, 164 F. 2d 949, 950 (C. C. A. 10).[8]

[8] Under 18 U. S. C. 709a the federal sentence would begin as soon as the prisoner was incarcerated under it. That section provides that "The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That if any such person shall

A construction which would gear the commencement of the federal sentence in this case to the expiration of respondent's state parole period would produce results which certainly no federal judge could seriously have contemplated. It would require the unreasonable assumption that the sentencing judge desired that respondent should enjoy the bounty of an interlude of liberty before beginning the service of his federal sentence. Plainly, the interests of society would have been poorly served by permitting a prisoner with a concededly valid 10-year sentence (see R. 2, 23, 38, 40) to remain at large. There is the obvious temptation of flight in such a situation to avoid reincarceration. And, from the standpoint of the defendant, it is difficult to believe that a sentencing judge, for the sake of giving him a temporary break in imprisonment, would ignore the long-range advantage to a prisoner of serving his sentences without interruption, so that when finally released he might effect his rehabilitation

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be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

Under the *McPike* and other decisions referred to in the preceding footnote, it is obvious that by reason of 18 U. S. C. 709a the same result as is here urged would follow if the federal sentence involved in this case had been silent as to the date it was to begin. See also *Rohr* v. *Hudspeth*, 105 F. 2d 747 (C. C. A. 10).

without being faced with the prospect of reincarceration at a later date.

Significantly, the federal parole system was established on the precise basis that there should be no break in imprisonment for parole purposes where the defendant is incarcerated under consecutive federal sentences. It accomplishes this by aggregating the consecutive sentences and treating them as a single sentence for the purpose of determining the parole eligibility date. Thus, 18 U. S. C. 714 provides that "Every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined * * * in any United States penitentiary or prison, for a definite term *or terms* of over one year, * * * whose record of conduct shows that he has observed the rules of such institution, and who * * * has served one-third of the total of such term *or terms* * * * * may be released on parole * * *." [Italics supplied]. Congress has thus declared that a workable parole system, designed to protect the interests of society and of the defendant himself, does not countenance the piecemeal serving of consecutive federal sentences, interrupted by intervals at liberty on parole.[8] It is hardly likely

[8] Similarly, the statute fixing the deductions from sentences for good conduct (18 U. S. C. 710) does not contemplate that a prisoner serving consecutive sentences is entitled to periodic interludes of liberty in which to enjoy his good-time deductions before returning to prison to commence service of the

that a federal sentencing judge, presumably familiar with this system, would designedly so frame a federal sentence made to run consecutively to a state sentence as to grant the defendant an interlude at large on parole before beginning his federal sentence.

Additionally, in any case where a federal sentence contains language such as that used in the sentence in this case and the state prisoner is on parole for a long period of time or for life, the result might be that the federal sentence may never be served if the Ninth Circuit's view, now adopted by the Tenth Circuit, were upheld. It is unreasonable to suppose that any such impediment to the successful administration of the federal criminal laws could have been intended by the language employed in the federal sentence.

In *United States ex rel. Lombardo* v. *McDonnell*, 153 F. 2d 919, 920–921 (C. C. A. 7), followed by the district court (R. 19), in which it was held that language substantially identical with that contained in the federal sentence here in controversy permitted the incarceration of the defendant upon his release on parole from an Illinois state prison, the Seventh Circuit did not even discuss the difference in language regarded as decisive in respect of the federal sentences with which the *Wright*

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next succeeding sentence. It specifically provides that "When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated."

and *Kirk* cases were concerned, but centered its attention upon other phases of the reasoning in the *Wright* decision which are discussed in the succeeding point.

The reports show that in a number of cases involving analogous federal or state consecutive sentences, the authorities having the responsibility of enforcing the later sentence have incarcerated the prisoner under such sentence on his release from imprisonment under the earlier sentence prior to the date it technically expired without objection on the part of the authorities of the other sovereignty. *Wall* v. *Hudspeth,* 108 F. 2d 865 (C. C. A. 10); *People ex rel. Hesley* v. *Ragen,* 396 Ill. 554 (1947); *People ex rel. McCarthy* v. *Ragen,* 389 Ill. 172 (1945); *Jackson* v. *Kaiser,* 353 Mo. 919 (1945); *Wilkinson* v. *Youell,* 180 Va. 321 (1942); cf. *Zerbst* v. *McPike,* 97 F. 2d 253 (C. C. A. 5); *In re Sanford,* 10 Wash. 2d 686 (1941); see also *Kite* v. *Commonwealth,* 52 Mass. 581, 585 (1846); *In re Walsh,* 37 Neb. 454, 458 (1893). While the point here presented was not involved in these cases, they are nevertheless significant in that they show that it occurred to no one concerned that the enforcement of the later or consecutive sentence had to be delayed until the technical expiration of the earlier sentence, and are thus indicative of the artificiality of such a view

B. *Irrelevance of the question whether Missouri properly administered its parole laws in surrendering respondent to the federal authorities*

for service of the federal sentence.—The Ninth Circuit's decision in *Johnston* v. *Wright* was influenced to a considerable extent by its analysis of the Illinois parole law and the resulting conclusion that the Illinois parole agency was without authority to parole a prisoner for the purpose of subjecting him to the service of a sentence obtained in another jurisdiction (137 F. 2d at 917).

However, in its later decision in *Kirk* v. *Squier, supra,* where the language of the federal sentence was that it was to commence upon "release from imprisonment" under the state sentence, the court was not so concerned with whether California parole law supported the exercise of the power held to be lacking under the Illinois law in the *Wright* case. While it found a provision which it felt justified the action of the California parole board in surrendering the prisoner to the federal authorities, its decision was based largely on the broad ground that "In this act of paroling Kirk under the conditions noted, the State of California was administering its own parole laws. Neither Kirk nor the federal government had the legal right to interfere therewith or to shape or dictate the terms and conditions which this sovereign state might and did elect to attach to this parole. * * * Nor may Kirk by habeas corpus proceedings invoke the doctrine of comity to resist this exercise of state authority since he has violated the laws of both sovereignties. He may not,

of right, demand priority for the judgment of either." (150 F. 2d at 7–8).

And in the later case of *United States ex rel. Lombardo* v. *McDonnell,* the Seventh Circuit did not even attempt any analysis of the Illinois parole law, the same one which loomed so largely in the *Wright* case, but held directly that "While it may be true that when Lombardo was released on parole from the Illinois State Penitentiary he was theoretically a prisoner of the State, yet where a prisoner is on parole from one of two sovereigns, it is for the sovereign granting the parole, and not the prisoner, to determine priority of jurisdiction over him in connection with such parole, *United States ex rel. Demarois* v. *Farrell,* 8 Cir., 87 F. 2d 957, and the fact that he is subject to the terms of a State parole does not exempt him from being taken by the federal government where no objection is made by the paroling State, *United States* v. *Marrin,* D. C., 227 F. 314; that is to say, 'He may not, of right, demand priority for the judgment of either,'" citing the Ninth Circuit's decision in *Kirk* v. *Squier, supra* (153 F. 2d at 920–921). Cf. *Ponzi* v. *Fessenden,* 258 U. S. 254, 260; *Morse* v. *United States,* 267 U. S. 80, 82; *Rosenthal* v. *Hunter,* 164 F. 2d 949, 950 (C. C. A. 10); *Stamphill* v. *Johnston,* 136 F. 2d 291 (C. C. A. 9), certiorari denied, 320 U. S. 766; *Lunsford* v. *Hudspeth,* 126 F. 2d 653, 658, dissent-

ing opinion;[10] *Banks* v. *O'Grady*, 113 F. 2d 926, 927 (C. C. A. 8); *Wall* v. *Hudspeth*, 108 F. 2d 865, 866–867 (C. C. A. 10).

We have set out in the margin the pertinent provisions of the Missouri parole law of 1945.[11]

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[10] The majority opinion turned on a point not relevant to this discussion.

[11] Missouri Revised Statutes Annotated, 1947, Cumulative Annual Pocket Part:

"§ 8992.39 Release on parole

"The board of probation and parole is hereby authorized to release on parole any person confined in any state correctional institution, except persons under sentence of death. All paroles shall issue upon order of the board and shall be recorded. Inmates shall be considered for parole upon the application of the prisoner or upon the initiative of the board. The board shall secure and consider all pertinent information regarding each inmate, except those under sentence of death, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, attitude in the correctional institution, and reports of physical and mental examinations which have been made. Before ordering the parole of any inmate, the board shall have the inmate appear before it and shall interview him. A parole shall be ordered only for the best interest of society. A parole shall be considered a correctional treatment for any inmate and not an award of clemency. A parole shall not be considered to be a reduction of a sentence or a pardon. An inmate shall generally be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care and when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the board of probation and parole. Said board shall have the power and it shall be its duty when conditions so warrant to revoke or terminate any parole, and place the offender again in the custody of the proper correctional institution. Said board

It is evident that the Missouri Board of Probation and Parole is given broad parole powers. Upon its own initiative it may release on parole any person confined in any state correctional institution, except persons under sentence of death, the parolee shall be amenable to the orders of the board while on parole, and the board "may adopt such additional rules not inconsistent with the law as it may deem proper and necessary with respect to the eligibility of inmates for parole, * * * and conditions upon which inmates may be placed on parole." In the absence certainly of any specific provision to the contrary, the provisions recited would seem adequate to authorize the board to release a prisoner on parole for the purpose of serving a sentence rendered in another jurisdiction. Cf. *Kirk* v. *Squier, supra* (150 F. 2d at 7).

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may adopt such additional rules not inconsistent with the law as it may deem proper and necessary with respect to the eligibility of inmates for parole, the conduct of parole hearings, and conditions upon which inmates may be placed on parole. Each order for a parole issued shall contain the conditions thereof. All decisions of the board shall be by a majority vote. Laws 1945, p. 723, § 39."

"§ 8992.37 Secretary of board of probation and parole—bond

"The board of probation and parole shall appoint a secretary, who shall be the chief administrative and executive officer of the board. The secretary shall have, under the direction of the board, immediate control of presentence, and pre-parole investigations, supervision of paroles, district offices, and employed personnel of the board, and shall perform, in addition, such duties as the board may prescribe. * * * Laws 1945, p. 723, § 37."

But even if the board's power in that respect were less clear, it does not seem to us that resolution of the question here presented involves in any proper respect an appraisal of that power. The question here is, simply, whether the federal sentencing judge intended respondent's sentence to become effective when it became evident, as it later did, that the state sentence was regarded by the local authorities as no longer an obstacle to the enforcement of the federal judgment. The question is not whether the Missouri parole authorities properly administered state law in surrendering respondent to the custody of the Federal Government for service of his sentence. That, patently, is a problem purely of state concern. Concomitantly, respondent, as a violator of the laws of both sovereignties, is certainly not in a position through habeas corpus to say that comity demands that he be allowed to remain at large in Missouri until his parole period expires, and thus postpone the execution of his federal sentence. What comity demands in a particular situation is a matter for the resolution of the sovereignties concerned, not the prisoner himself. Moreover, by lessening the total term of his imprisonment respondent was, in reality, benefited, not harmed, by the action of the Missouri parole authorities.

That a state may regard its erstwhile prisoner during federal incarceration as technically a pa-

rolee until the expiration of his parole period and reserve the right to resume control of him as a parolee if he is released from federal custody during that period, is without significance. Even the Ninth Circuit itself, in its later decision in *Kirk* v. *Squier, supra,* recognizes that this constitutes no bar to the enforcement of the federal judgment, provided, of course, the appropriate operative words have been used in the federal sentence. See also *United States ex rel. Lombardo* v. *McDonnell, supra; Rosenthal* v. *Hunter,* 164 F. 2d 949 (C. C. A. 10).

CONCLUSION

The judgment of the circuit court of appeals should be reversed and that of the district court affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

W. MARVIN SMITH,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 643

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS,

Petitioner,

vs.

FRED CLIFFORD MARTIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

JAMES F. REILLY,
Attorney for Respondent,
821 15th Street, N. W.,
Washington, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS,

Petitioner,

vs.

FRED CLIFFORD MARTIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

Opinion Below

The Circuit Court of Appeals for the Tenth Circuit reversed the District Court without opinion upon the authority of *Johnston* v. *Wright*, (Ninth Circuit), 137 F. (2d), 914 (R. 43) and on February 12, 1948, denied rehearing (R. 48). The findings of fact and conclusions of law of the trial court are found at pages 18 and 19 of the record.

Jurisdiction

Section 240 (a) of the Judicial Code (Title 28, Section 347 of the United States Code), confers jurisdiction herein.

Statute Involved

Missouri Revised Statutes Annotated, Cumulative Pocket Part (1947), Section 8992.39, Volume 19, is quoted in the government's brief, footnote 11, p. 24.

Question Presented

We think the question somewhat different than that recited by the Petitioner. Respondent, pursuant to a sentence imposed by Missouri courts was confined in the state penitentiary. The sentence will not expire until August 26, 1948. (R. 26) Upon parole by the Missouri parole authorities on May 13, 1947 he was surrendered by the Missouri jailer to the federal authorities. (R. 26-11) The order of parole does not recite, as a condition of parole, that respondent begin serving his federal sentence or even that he be surrendered to federal authorities. (R. 25-26) Therefore, the question seems to be whether the federal authorities could take Respondent into custody pursuant to the federal judgment (R. 10) at a time prior to the expiration of the state sentence, without the consent of Missouri authorities.

Secondly, we submit, it must be determined whether the jurisdiction of the Missouri courts was exhausted when Respondent was paroled, or whether jurisdiction was retained until the parolee completed his sentence.

The Facts

Respondent was convicted of larceny in Missouri. His sentence will expire August 26, 1948 (R. 26). However he was paroled on May 13, 1947. The instrument granting parole provided: (R. 25-26)

"Fred C. Martin, No. 58857, now confined in the Missouri State Penitentiary who was convicted and sentenced in the county of Grundy on the 27th day of September 1945, and received at the Penitentiary on the 28th day of September 1945, for a term of 3 years, for the crime of PG: Larceny of an auto which sentence expires on the 26th day of August 1948, is hereby released on Parole, which may be revoked without notice, by the Board of Probation and Parole, by virtue of the authority conferred by law upon said Board of Probation and Parole.

"It is therefore ordered that Fred C. Martin be released on the 13th day of May 1947, upon the following conditions:

"That the above-mentioned recipient shall remain in the legal custody of the Missouri State Penitentiary, but shall be amenable to the orders of the Board of Probation and Parole until the expiration of the maximum term, or until returned to the Missouri State Penitentiary by order of the Board of Probation and Parole."

His release from state custody was effected by delivery to the custody of Federal authorities. (R. 25 and 31). Delivery to Federal authorities was made pursuant to a sentence imposed by the Federal District Court in Missouri (R. 6), which was to begin to run at the expiration of the sentence then being served by respondent in the Missouri penitentiary (R. 6). As hereinbefore indicated, that sentence will not expire until August 26, 1948. Respondent sought release on the grounds that he cannot be taken into federal custody until the state jurisdiction is exhausted by the completion of his state sentence.

I

Argument

Counsel submits that had the federal sentence provided that his sentence was to begin upon his release or discharge from state prison, rather than upon the expiration of the sentence imposed by the Missouri courts, the case would

not be here, *cf. Kirk* vs. *Squier, infra*. If the terms of his parole had directed his delivery to federal authorities as a condition of his parole, he could not complain.

The simple fact that cannot be avoided by any technicality of construction is that the prisoner was and still is in the custody of Missouri. The federal sentence by its own terms does not begin until the Missouri sentence expires. Under rules of comity it cannot begin until the jurisdiction of Missouri courts has been exhausted by expiration of the sentence or surrender by the sovereign. However, we believe that because of the terms of the federal sentence, the principles of comity are not applicable.

An analysis of the Missouri parole statute is appropriate in order to determine the status of respondent.

Section 8992.39, Volume 19, Missouri Revised Statutes Annotated, Cumulative Pocket Part (1947) provides the parolee shall remain in the legal custody of the institution from which released.

The order granting parole said nothing relative to release to federal authorities. (R. 25-26)

The latest expression of the Missouri Supreme Court relation to parole is found in *State* v. *Brinkley*, 354 Missouri, 1051, 193 S. W. (2d) 49, 58 (1946). There, it was held:

> "It (parole) is rather a conditional release of the prisoner from confinement having as its objective his rehabilitation * * *. The prisoner is conditionally released from physical custody but his conviction and sentence remain in force and he continues in *constructive custody.*" Citing:
>
> *46 C. J. 76, page 1208;*
> *39 A. J. 91, page 577;*
> *Herring v. Scott, (Missouri Supreme Court) 142 S. W. (2d) 671, 672;*
> *Ex parte Kabritch, 343 Mo. 196, 197, 120 S. W. (2d) 42, 43(2);*
> *State v. Jennings, 278 Mo. 544, 551 (I), 213 S. W. 421, 422.* (Italics ours.)

In Mattes v. *Taylor* (*Supreme Court of Missouri, 1941*) *348 Mo. 434, 153 S. W. (2d) 833* the prisoner was paroled or conditionally pardoned by the Governor of Missouri. The State of Washington was seeking to extradite him. The Missouri Governor consented, but the prisoner contended that he could not be extradited. The Court held that even though the prisoner was on parole he was still under sentence and the sovereign may consent. We respectfully invite the attention of the Court to the fact that this record does not indicate consent by Missouri.

It is submitted that under Missouri law, the prisoner, although paroled, is still under Missouri jurisdiction. Under well established principles of comity, the Federal authorities could not take him into custody. *Taylor* v. *Taintor*, 16 Wallace 366, 21 L. Ed. 287.

The act of the State jailers in surrendering him to Federal authorities was without authority of law. The Federal officers who took him from the Missouri jurisdiction could act only pursuant to the judgment of the Federal court. That judgment provided that the Federal sentence should begin to run at the expiration of the sentence then being served by the petitioner in the Missouri penitentiary. Consequently, the Federal authorities were without right in taking the respondent into custody until the expiration of that sentence. The language of this Court in *Hill* v. *United States ex rel. Wampler*, 298 U. S. 460, 80 L. Ed. 1283-1286, is particularly pertinent.

> "The only sentence known to the law is the sentence or judgment entered upon the records of the court."
>
> "• • • A warrant of commitment departing in matter of substance from the judgment back of it is void."
>
> "• • • Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus."

The respondent maintains that until the expiration of his Missouri sentence on August 26, 1948, at which time the commitment in the Federal court takes effect, no valid commitment could be issued. The accelerated commitment issued in this case was void.

II

The Status of Parolee

The status of one on parole should be determined in order to properly evaluate the question presented herein. The granting of parole merely extends the walls of the penitentiary and releases the convict from imprisonment upon conditions imposed by the parole authorities. He is subject to be recalled and complete his sentence. He is not free. The sentence continues until it expires by its terms. It is merely a different manner of serving a sentence other than by confinement in prison.

In *Fuller* v. *State*, 122 Ala. 32, 26 So. 146, 45 L. R. A. 502, the Alabama Supreme Court stated:

> "The parole does not in any wise displace or abridge the sentence. It merely stops its execution for a time only."

In the case of *Ex parte Patterson, 94 Kan. 439, 146 Pac. 1009, L. R. A. 1915F 541*, the court said that a parole is not a vacation of the sentence imposed:

> "It suspends the execution of the penalty, and temporarily releases the convict from imprisonment upon conditions which he is at liberty to accept or reject." (544)

See also *39 American Jurisprudence page 525, section 11; page 572, section 82; Woods v. State, 130 Tenn. 100, 169 S. W. 558, L. R. A. 1915F 531; Ex parte Ridley, 3 Okla. Crim. Rep. 350, 106 Pac. 549, 26 L. R. A. N. S. 110.*

In *Crooks* v. *Sanders*, 123 S. C. 28, 115 S. E. 760, 28 A. L. R. 940, the South Carolina Supreme Court discusses the meaning of parole and indicates that it is a leave of absence from prison bounds.

In the case of *Sellers* v. *Bridges*, 153 Fla. 586, 15 So. (2d) 293, 148 A. L. R. 1240, the Court said of parole (Page 1241):

> "The parolee, although at large while on parole, is a prisoner no less than a prisoner physically confined. He is enduring compulsory expiation of an offense. He is under daily personal restraint. He is at all times answerable to prison system officials for his conduct. Such officials have authority to greatly circumscribe his freedom of choice and action. Being amenable to prison system rules and authority and under immediate restraints is he not, to all practical purposes, in custody? See *Carpenter* v. *Lord*, 88 Or. 128, 171 P. 577, 579, L. R. A. 1918 D 674, 677.
>
> "Parole is that procedure by which a prisoner who must in any event be returned to society at some time in the future is allowed to serve the last portion of his sentence outside prison walls and under strict supervision, as preparation for his eventual return to society."

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> "Parole, therefore, is not an act of amnesty or forgiveness—as some suppose. It does not put an end to sentence legally imposed. Rather, it is a continuation of sentence."

In the case of *Anderson* v. *Corall*, 263 U. S. 191, 196, 68, L. Ed. 247, 254, this Court was interpreting the Federal parole law and stated:

> "The parole authorized by the statute does not suspend service or *operate to shorten the term*. While on parole the convict is bound to remain in the legal custody and under the control of the warden until the

> expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, it is, in legal effect, imprisonment. The sentence and service are subject to the provision of § 6, that if the parole be terminated, the prisoner shall serve the remainder of the sentence originally imposed without deduction for the time he was out on parole." (Italics ours)

The Federal parole statute is found in *Title 18, Section 716 et seq. of the United States Code. Section 717* provides for retaking in the event of violation of parole. However, the Federal Statute (Section 716) does provide that he shall remain in the legal custody and under the control of the warden until the expiration of the term specified in his sentence while section 716b provides that the parolee may be surrendered to State authorities. We find nothing comparable to the latter in the Missouri statutes (Vol. 19, Section 8992.39 Missouri Revised Statutes). In the instant case the respondent remained in the legal custody of the Missouri State Penitentiary by the very terms of the order granting him parole (R. 26).

It is interesting to note that in the case of *Rosenthal* v. *Hunter*, 164 F. (2d) 949, 950 (C. C. A. 10, 1947), perhaps the latest expression on the status of a paroled prisoner, the Court held:

> "A prisoner on parole is constructively a prisoner of the state in the legal custody and under the control of the state board of prisoner directors."

The aforementioned authorities conclusively indicate, we believe, that Missouri retains jurisdiction until final release of the prisoner. Then, and then only, could he be taken into custody pursuant to the judgment of the Federal court.

III

Analysis of Federal Cases

The opinions of the Ninth and Tenth Circuits are apparently in conflict with the Seventh Circuit. In order to resolve that conflict this Court granted certiorari.

In the instant case the Tenth Circuit followed the reasoning of the Ninth in the case of *Johnston* v. *Wright*, 137 F. (2d) 914, and without opinion reversed the judgment of the District Court. The Seventh Circuit in the case of *Lombardo* v. *McDonnell*, 153 F. (2d) 919, was unable to agree with the Ninth Circuit.

Respondent relies upon *Johnston* v. *Wright, supra.* There, Wright was sentenced by the Illinois court and while on parole and at large was again tried and convicted in the State court. His sentence was one year to life. While serving this sentence, he was by means of a writ of *habeas corpus ad prosequendum* tried and convicted in a Federal court and sentenced to ten years. The Federal sentence was *to begin upon the expiration of the sentence he was then serving in the Illinois State Penitentiary.* Wright complained to the Federal authorities that he could not make parole in the State proceedings as long as a Federal detainer was placed against him and upon inquiry from the Federal to the State authorities, the latter indicated that "the fact of the Federal detainer would be an important factor in his being given a parole much sooner." Eventually he was paroled effective *when the Federal authorities came for him.* If not taken, the case was referred back to the Board.

Wright's contention (not material here) is that his State and Federal sentences were concurrent and therefore both sentences had been served. The contention was rejected.

The warden maintained that the Federal sentence began to run when Wright was *released* from the State prison. The C. C. A. 9th said:

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"We think the warden's position cannot be sustained because the starting of the sentence is premised upon the expiration of the state sentences and not upon Wright's release from the state prison. The text of the sentences does not permit of the interpretation suggested by the warden. We do not deem the sentences void for indefiniteness. For authority bearing on this point but not covering the exact question here, see *Wall* v. *Hudspeth, 10 Cir., 108 F. 2d 865; McNealy* v. *Johnston, 9 Cir., 100 F. 2d 280, 282; Brown* v. *Johnston, 9 Cir., 91 F. 2d 370, 372; Austin* v. *United States, 9 Cir., 19 F. 2d 127, 129.* It is true that a court may surrender the custody of a person to the custody of a court in another jurisdiction under the principle of comity (*Wall* v. *Hudspeth, 10 Cir. 108 F. 2d 865; Ponzi* v. *Fessenden, 258 U. S. 254, 260, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879*) as the warden-appellant here contends. But that is not the point in the instant proceeding. Here the point is that there is no sanction for the federal jurisdiction to have Wright's custody at all because the event that awakens the federal sentences from a dormant state has never happened."

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"The evidence clearly shows that Wright's discharge from the Illinois prison was not based upon any showing whatever that the state sentences have expired. He was released from state prison nominally on parole, but actually his custody was merely transferred to the federal authorities for further imprisonment in a federal institution. Wright's state sentence was one year to life. There is no evidence whatever that this indeterminate sentence had been fixed to the period he had served in the state prison."

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"The Illinois parole law gives no authority to the Department of Public Safety, Division of Correction, which governmental agency issued the parole, to terminate a court sentence. Incidentally, it does not appear to give authority to any parole officer or board to parole a prisoner to officers of another jurisdiction for the purpose of subjecting the prisoner to a sentence obtained in the other jurisdiction."

We invite the Court's attention to the Missouri statutes, which, likewise, fail to give to the parole authorities the right to terminate a sentence.

In *Stamphill* v. *Johnston* (C. C. A. 9th, 1943), 136 F. (2d) 291, a petition for a writ of habeas corpus was filed by the petitioner who was confined in Federal prison pursuant to a commitment of a Federal district court in Oklahoma. Prior to his Federal commitment, he had been sentenced to life imprisonment in Oklahoma but the warden of the State penitentiary surrendered him to the Federal courts for trial which resulted in conviction and sentence. Appellant maintained that as long as he was in the State penitentiary prior to Federal trial and commitment he should finish his State sentence before being required to serve his Federal sentence on the ground that the State first acquired jurisdiction.

The Court said: Page 292

"There is no doubt that the state of Oklahoma, having first acquired jurisdiction over the appellant, was entitled to retain him in custody until he had finished his sentence and could not be required to surrender him to the custody of the United States marshal for trial in the federal court for an offense committed in violation of federal law. *Ponzi* v. *Fessenden*, 1922, 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879, Cf. *Ableman* v. *Booth*, 21 How. 506, 62 U. S. 506, 16 L. Ed.

169, and 28 U. S. C. A. § 453. However, in this case the state authorities did in fact surrender the appellant to the federal authorities, and thus in effect gave the federal court jurisdiction to try the appellant and to render judgment of imprisonment against him and to execute that judgment."

On the question of comity, the Court said:

"'Courts of the United States are bound to proceed to judgment * * * in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.' *Hyde* v. *Stone, 20 How. 170, 61 U. S. 170, 175, 15 L. Ed. 874.* However, the defendant was brought before the District Court, once he was there it had and was bound to exercise complete jurisdiction over him. It is clear that the federal authorities had actual possession of appellant during his trial in the federal court. Jurisdiction resulted from that possession and it follows that any question concerning the rightfulness of what was done in the exercise of that jurisdiction is merely a question of comity. Such a question cannot be raised by habeas corpus, which can be used to question the validity of imprisonment only upon jurisdictional grounds (*Price* v. *Johnston, 9 Cir., 125 F. 2d 806*) or on the ground, not presented by this case, of violation of a fundamental constitutional guarantee. *Waley* v. *Johnston, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302.*"

The Court also said that any arrangement between the two sovereigns does not concern the defendant.

We find in *Grant, et al.* v. *Guernsey,* 63 F. (2d) 163 (10th Cir.), that in September, 1930, appellee was indicted in the U. S. District Court for Kansas. The indictment alleged a violation of the National Banking Act. He was convicted, sentenced to three and one-half years, but placed on probation.

The State instituted a prosecution for embezzlement committed prior to his sentence in the Federal court.

Guernsey protested that he was under the jurisdiction of the Federal court, *subject to its orders* and that the proceedings before the State justice were an interference with that jurisdiction and could not be maintained.

The Court said:

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> "There can be no doubt Guernsey was under the jurisdiction of the federal court, subject to its orders under the probation statute at any time; and when the justice of the peace issued his warrant for the arrest of Guernsey and then held him for trial on the state charge and that he abide the judgment of the state court, there was a direct interference with federal jurisdiction, and a violation of the rule of comity between federal and states courts."

The Court cited *Taylor* v. *Taintor*, 16 Wall. 366, 370, 21 L. Ed. 287, and reiterated that the sovereignty first taking jurisdiction retained it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted.

In *Lunsford* v. *Hudspeth*, 126 F. (2d) 653 (10th Cir.) the Court said: 655

> "It is equally well settled that unless founded upon some matter justifying the exercise of federal authority necessary to enforcement of rights, and immunities granted by the constitution, laws and treaties of the United States, no court, or judge thereof, can issue a writ of habeas corpus to bring up a prisoner who is in custody under a sentence or execution of a State court for any other reason, than to be used as a witness in the trial of a cause. *Ex parte Burrus, 136 U. S. 586, 10 S. Ct. 850; 34 L. Ed. 500; Ex parte Dorr, 3 How. 103, 11 L. Ed. 514; Ex parte Johnston, supra; Ex parte Burrus, supra, and In re Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55. See, also, Velazquez* v. *People of Puerto Rico, 1 Cir., 77 F. 2d 431.*"

In *Wall.* v. *Hudspeth* (C. C. A. 10th, 1940) 108 F. 2d 865 the Court said: 866

> "But either the federal or a state government may voluntarily surrender its prisoner to the other without the consent of the prisoner, and in such circumstances the question of jurisdiction and custody is purely one of comity between the two sovereigns, not a personal right of the prisoner which he can assert in a proceeding of this kind. *Ponzi* v. *Fessenden, supra; In re Andrews, D. C., 236 F. 300.*"

The aforegoing authorities seem to counsel for respondent to compel the conclusion that the Missouri courts having first taken jurisdiction retained it to the exclusion of the Federal authorities until the sentence of respondent was completed and its jurisdiction exhausted. As we have heretofore indicated, we do not believe the law of comity is pertinent to this case, because it was the judgment of the Federal court that authorized the imprisonment of respondent and that judgment does not become effective until August 26, 1948.

However, in *Lombardo* v. *McDonnell and Durkin* v. *McDonnell* (C. C. A. 7th), 153 F. (2d) 919, we find a conclusion contrary to *Johnston* v. *Wright, supra.* On July 24, 1936, in a State court, Lombardo was convicted of robbery. On August 7, 1936, he was committed to the Illinois State Penitentiary. While serving the sentence in the State Penitentiary, he was indicted in Federal court and upon a writ of *habeas corpus ad prosequendum* was tried in the Federal court. There he was sentenced to fifteen years. The judgment stated that "*the sentence to commence on the date of the expiration of the sentence under which he is now confined in the Illinois State Penitentiary.*" (identical to instant case). On March 12, 1945, he was paroled from the Illinois penitentiary and was taken in custody by the United States. He challenged the effectiveness of the

United States Marshal's custody on the ground that it was premature and could not be obtained until the expiration of his State parole. He argued that the parole was but an extension of the boundaries of the Illinois penitentiary and relied upon *Johnston* v. *Wright*, 9 Cir., 137 F. (2d) 914. The Court felt that it was not controlling and said:

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"Unquestionably the State of Illinois, having first acquired jurisdiction over appellee, was entitled to retain him in custody until he had finished his sentence, *Stamphill* v. *Johnston*, 9 Cir. 136 F. 2d 291. That rule rests upon principles of comity, and it exists between federal and state courts. *Ponzi* v. *Fessenden*, *258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879.*: While it may be true that when Lombardo was released on parole from the Illinois State Penitentiary he was theoretically a prisoner of the State, yet where a prisoner is on parole from one of two sovereigns, it is for the sovereign granting the parole, and not the prisoner, to determine priority of jurisdiction over him in connection with such parole. *United States ex rel. Demarois* v. *Farrell, 8 Cir., 87 F. 2d. 957,* and the fact that he is subject to the terms of a State parole does not exempt him from being taken by the federal government where no objection is made by the paroling State, *United States* v. *Marrin, D. C., 227 F. 314;* that is to say, 'He may not of right demand priority for the judgment of either.' *Kirk* v. *Squier*, 9 Cir., 150 F. 2d 3, 8.

Durkin was sentenced by a Federal court which was "*to take effect upon his release from custody by the authorities of Illinois*", (quite different from the present case).

In speaking of the interpretation of a Federal sentence, the Court said that the controlling consideration appears to be:

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"Is the language clear; does the language indicate the intent of the court; and does the sentence on its face

raise any d.. .bt on the part of those who must execute it? This we learn from a study of the case of *United States* v. *Daugherty, 269 U. S. 360, 46 S. Ct. 156, 70 L. Ed. 309.* In that case the court at page *363 of 269 U. S., 46 S. Ct. 157, 70 L. Ed. 309* said: 'Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded.'"

The Court continued and said that the sentences of Lombardo and Durkin excluded any serious misapprehensions of those who must execute them and revealed the intent of the court rendering the judgment.

Respondent maintains that Lombardo's position, similar to our own, did not reveal with fair certainty the judgment of the trial court but that Durkin's did.

However, it is submitted that caution in the terms of the sentence or the instrument granting parole would have avoided any difficulty. Under *United States* v. *Daugherty, infra,* and *Hill* v. *United States ex rel. Wampler, infra,* trial courts should use meticulously precise language in judgment entries when sentences for crime are imposed.

In *United States* v. *Daugherty,* 269 U. S. 360, 70 L. Ed. 309, 313, the Court had before it a sentence wherein the defendant was imprisoned for five years on each count of a three count indictment charging violation of the narcotic law. Although this Court sustained the sentence, it did say that:

> "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them."

It further said:

> "This and similar unfortunate causes should admonish the trial courts to require the use of meticu-

lously precise language in all judgment entries. Especial care is essential where sentences for crime are imposed."

The law of comity is too well known to warrant discussion. We find, in the case of *Taylor* v. *Taintor* (1873), 83 U. S. 366, 21 L. Ed. 287, 290, this Court said:

> "Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it, holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. *Hagan* v. *Lucas, 10 Pet., 400; Taylor* v. *Carryl, 20 How., 584 (61 U. S. XV, 1028); Troutman's case, 4 Zabr., 634; Ex parte Jenkins, 2 Am. Law Reg., 144.* It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function."

In *Ponzi* v. *Fessenden*, 258 U. S. 254, 66 L. Ed. 607, 22 A. L. R. 879, Ponzi, on September 11, 1920, was indicted in the State Court of Massachusetts charged with larceny. On October 1, 1920, he was indicted in the Federal District Court of Massachusetts. He pleaded guilty in the Federal court and was sentenced to imprisonment and committed. While in Federal custody a writ of habeas corpus was issued to bring him before the State court for trial. The jailer replied that he held Ponzi pursuant to the process of the United States. The Attorney General consented to the issuance of the writ. Thereafter, Ponzi filed a petition for habeas corpus alleging that he was within the exclusive control of the United States and the State court had no jurisdiction to try him.

In passing upon this question this Court held that it was within the powers of the Federal government to consent

to the transfer, and the prisoner had no say in the matter. The court said: Page 883

> "He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws, in order that the other may also subject him to conviction of crime against it. *Re Andrews, 236 F. 306; United States* v. *Marrin, 227 F. 314.* Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it, and of its representatives with power to grant it."

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> "The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, *must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose.*"

The Court further said: 884

> "In the case at bar, the Federal district court first took custody of Ponzi. He pleaded guilty, was sentenced to imprisonment, and was detained under United States authority to expiate the punishment imposed. Until the end of his term and his discharge, no state court could assume control of his body without the consent of the United States."

Be it remembered that in the instant case, the record does not disclose the consent of Missouri. The jailers could not consent or act for the sovereign. There must be more of a relinquishment of jurisdiction by Missouri than is indicated here.

It is of interest to note that in *Kite* v. *Commonwealth*, 11 Met. 581, 585; 52 Mass. 581, 585; Sup. Jud. Ct. Mass. 1846, the Court had before it the question of the certainty of a judgment which imposed a sentence to commence upon the termination of a previous sentence and said through Chief Justice Shaw:

> "The Court are of the opinion that it is no error in a judgment, in a criminal case, to make one term of imprisonment commence when another terminates. It is as certain as the nature of the case will admit; and there is no other mode in which a party may be sentenced on several convictions. Though uncertain at the time, depending upon a possible contingency that the imprisonment of the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment, or a pardon, it then expires; and then by its terms, the sentence in question takes effect, as if the previous one had expired by lapse of time. Nor will it make any difference, that the previous judgment is reversed for error. It is voidable only and not void; and until reversed by a judgment, it is to be deemed in full force and effect; and though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect."

Respondent's sentence had been neither remitted, shortened nor terminated. It was still in existence and the event which will vitalize the Federal judgment and commitment, viz., the expiration of his Missouri sentence has not yet occurred. Until that time, he cannot be lawfuly committed by Federal authorities.

The *Federal statute*, 18 U. S. C. 709a, providing that sentence is to commence when a prisoner is received into Federal custody, cannot control. It is the judgment of the court that determines the sentence, not the warrant of commitment. *Biddle* v. *Shirley* (C. C. A. 8th) 16 F. (2d) 566, 567.

In *United States ex rel. Chasteen* v. *Denemark* (C. C. A. 7th 1943) 138 F. (2d) 289, 291, the Court said:

> "A sentence in a criminal case should be clear and definite, *Hode* v. *Sanford*, 5 Cir., 101 F. (2d) 290, and be so complete as to need no construction of a court to ascertain its import. It should be so complete that to ascertain its meaning it will not be necessary to supplement the written words by either a nonjudicial or ministerial officer. He must find what the sentencing judge intended from the language which he used. *People* v. *Graydon*, 329 Ill. 398, 160 N. E. 748."
>
> • • • "A commitment depends for its validity on the judgment behind it. If the judgment and sentence do not authorize detention, no mittimus will avail to make detention lawful. *Hill* v. *United States ex rel. Wampler*, 298 U. S. 460, 56 S. Ct. 760, 80 L. Ed. 1283."

In *Kirk* v. *Squier*, 150 F. (2d) 3, (C. C. A. 9th, 1945) Kirk was serving a life term in California for kidnapping. Under that sentence there was, under the California law, a possibility of parole. He was indicted in the Federal court for violation of the Postal Laws and was sentenced to thirty-seven years imprisonment. The latter sentence was *"to commence to run upon the release of said defendant from the imprisonment he is now serving."* All this occurred in 1934. He was released on parole in 1942 by the California authorities and the release provided for surrender "to the custody of United States authorities". The latter authorities arrested and imprisoned him in the Federal penitentiary. He appealed from an adverse ruling seeking a writ of habeas corpus and alleged that his California sentence was for the rest of his life and that he should remain in the custody of the State until the expiration of the sentence. The court rejected his contention and stated that the Federal sentence was no longer in abeyance when he

was delivered to Federal custody, and distinguished the *Johnston* v. *Wright* case, *supra*. It noted the particular language used in the Johnston sentence, which provided that it should start upon the expiration of the State sentence, whereas in the *Kirk* case the sentence provided *upon the prisoner's release from the State prison.* Further, it provided that Kirk was released from custody in order that he might be imprisoned by the Federal government and there was a full consent by the State to his control and incarceration by the Federal government. Accordingly, it is believed that *Kirk* v. *Squier* is distinguishable from the instant case.

Conclusion

Respondent submits that the Federal authorities were and are without authority to take him into custody until the expiration of his State sentence on August 26, 1948. The judgment imposing sentence in the Federal court upon which confinement must rest is clear. Missouri did not surrender him. The parole by Missouri authorities did not recite that he be surrendered to Federal authorities. It recited the Respondent was to remain in the legal custody of Missouri (R. 26). Respondent cannot be taken into Federal custody other than pursuant to the District Court's judgment. Missouri, of course, has the power to consent by terminating the sentence or wording the parole order differently, but it did not do so.

The judgment below should be affirmed.

JAMES F. REILLY,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 643.—October Term, 1947.

Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, Petitioner,

v.

Fred Clifford Martin.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 24, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

Petitioner is held prisoner in the United States Penitentiary at Leavenworth, Kansas. He pleaded guilty to charges of forging and uttering United States Treasury checks. He was sentenced to imprisonment for ten years on each count, to run concurrently, and the judgment provided that sentence should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary." Petitioner was returned to the Missouri authorities to resume the service of a state sentence of three years for automobile theft. On May 13, 1947, before expiration of such period, he was paroled by the State and delivered to the federal authorities, by whom he has since been held. He contends that the federal sentence does not begin until the full term of the State sentence has expired and that, for the period of parole, he is entitled to freedom. The issue as to whether such wording of a federal sentence entitles the prisoner under such circumstances to temporary freedom is one on which Circuit Courts of Appeals are in conflict. Compare *United States, ex rel. Lombardo* v. *McDonnell*, 153 F. 2d 919; *Johnston* v. *Wright*, 137 F. 2d 914; *Kirk* v. *Squier*, 150 F. 2d 3; *Martin* v. *Hunter*, — F. 2d —. We brought the

case here on certiorari, 333 U. S. —, to resolve the conflict.

We think it clear that the purpose of the clause deferring commencement of service of the federal sentence was to prevent conflict between the State and Federal Governments. The present federal imprisonment avoids such conflict and achieves that purpose. Missouri authorities have released petitioner from their custody and surrendered him for the apparent purpose of serving his federal sentence and have reserved control over him as a parolee only in event he is not kept in prison during the period of the federal sentence. For all practical purposes contemplated by the judgment, the State sentence has expired—at least insofar as it was an obstacle to service of the federal sentence.

To hold otherwise would mean that a man already finally adjudged guilty of a serious federal crime and sentenced to ten years imprisonment would be left at large and free of all restraint for an interlude between release from the state prison and commencement of the federal term. We do not think such a result is required or intended under the statute, 18 U. S. C. § 709 (a)[1] or under the terms of the sentence as imposed.

The District Court, after full hearing, dismissed the writ of *habeas corpus* and remanded petitioner to custody to serve his sentence. We think this was a correct disposition of the matter. The Circuit Court of Appeals' decision to the contrary is error.

Judgment reversed.

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[1] The Act of June 29, 1932, c. 310, § 1, 47 Stat. 381.